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Conditional, Experimental and Substitutional Relief

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The purpose of this article is to explore the process by which a court, while administering specific or declaratory relief, adequately protects the legitimate interests of all parties by either conditioning relief upon the performance of some act by the party seeking such relief, by issuing a decree with flexible terms, or by granting relief different in kind than that which was sought. Since historically all specific and declaratory relief, with the exception of ejectment, replevin and extraordinary legal remedies such as mandamus, was administered by the former courts of chancery, such relief can be designated as equitable relief. Throughout this article equitable relief means only that and is not used to refer to substantive principles considered “equitable,” such as estoppel or restitution. We will also discuss the application of this process to those forms of specific relief denominated as “legal,” since historically administered by the common law courts.

The employment of conditional, experimental or substitutional relief recognizes that often neither party is wholly “in the right” or “in the wrong.” Where both parties have legitimate interests to be protected, the court should not refuse to recognize one, because it cannot protect the other, nor extend protection to only one at the expense of

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1. Throughout the article the party affirmatively seeking relief will be referred to as the plaintiff for sake of convenience. He may be the formal defendant, but is seeking affirmative relief.
2. We will assume that we are operating under a merged system of law and equity. At present only four states have separate courts of law and equity. The majority have but one “side,” though some have separate sides for law and equity. If properly administered, separate sides are matters of convenient division rather than remnants of separate systems. For a complete report on the merger in each state see the Appendices to Joiner & Geddes, The Union of Law and Equity, 55 Mich. L. Rev. 1059 (1957).
3. A great body of substantive law was formerly administered by the courts of chancery, e.g., trusts, domestic relations. Equitable relief as used throughout the article refers only to the specific and declaratory remedies formerly administered by the courts of chancery.
the other, without first making an attempt at adjustment, ultimately recognizing both. By its very nature equitable relief lends itself to apportioning loss or advantage, which damages often cannot do.\footnote{Consider, for example, the rule that "where one of two innocent parties must suffer for the acts of a third, the loss must be borne by the one who put the wrongdoer in a position to perpetrate the wrong." The court decides who that party is and makes no attempt to apportion the loss. Comparative negligence statutes do represent an attempt to apportion the loss resulting from an act, but the common law rule of contributory negligence as an absolute bar is in accord with the approach generally taken by the courts when administering damages remedies.}

Where a transaction in some respects interferes with policies the court or legislature has chosen to protect, the public interest in the implementation of those policies can in many instances still be protected, though some relief is given. The contrary is found in damages actions, where the court often must decide whether an award of damages in a certain case would be in the public interest and must refuse relief if it finds it would not. So too, when an award of damages involving a close question of that sort is decided in favor of the plaintiff, the public interest may be left unprotected.\footnote{This always occurs when a court must decide whether to enforce a contract tainted with some illegality. When it enforces such a contract, it can do nothing to protect against the conduct which it finds improper but not sufficiently so as to refuse enforcement.}

Because of the court's discretion in granting equitable relief, the terms under which the relief is given may be determinative of which party "won" the case rather than the court's holding as to liability and defenses.\footnote{Consider, for example, the result in Warner & Co. v. Lilly & Co., 265 U.S. 526 (1924). The plaintiff sought to enjoin the defendant's use of chocolate in its medical preparation on the ground that this constituted unfair competition, since the public thought that the product was manufactured by the plaintiff, who was the only other manufacturer using chocolate, and the defendant did nothing to counteract this impression. The Court found unfair competition, but the decree merely ordered the defendant to use a different label on its product to distinguish it from the plaintiff's. Obviously, the plaintiff wanted to force the defendant to cease using chocolate completely and thus eliminate competition. The plaintiff got all the relief to which he was entitled, but it may be asked whether the plaintiff "won" the case, even though the Court did find unfair competition. The same question may be asked when a jury finds negligence and returns a verdict for $1000 in a case where medical bills exceeded $3000. The defendant's lawyer would not consider that he "lost" that case.} I will consider the availability of each of the three types of relief, the circumstances under which the court will refuse to grant it due to the effect such relief would have on conflicting policies, and the types of situations in which such relief can be extended. A number of suggested changes will be made. I will further consider the effect that vestiges of the historical distinction between law and equity have on the granting of this relief. The emphasis will be on the result that accrues when the relief is given or refused; it is a basic proposition of this writing that except as required by statutory or constitutional provisions, e.g., the question of trial by jury, the result with respect to the relief
sought should not be dependent on whether the relief was historically
denominated as legal or equitable.

I. CONDITIONAL RELIEF

A. General Considerations

The types of conditional relief that the courts impose fall into two
basic categories. The first is the performance of agreed conditions or
the restoration of the status quo. For example, when the plaintiff seeks
specific performance, he must as a condition to the decree, conform to
the arrangements for payment of the purchase price. Further, when a
party seeks recission of a transaction, unless excused by policy reasons
or other defenses, he must return the consideration and otherwise re-
store the situation existing prior to consummation. Were an action for
damages or restitutionary relief brought, this performance would have
been a condition precedent to suit. The discussion here is focused on
when this condition is excused due to its conflict with policies the state
is trying to implement or because of other defenses to conditional re-
lief. The second, and more interesting type, is the imposition of addi-
tional conditions, because, under the circumstances, it would be unfair
to the opposing party or injurious to the public interest to permit the
relief sought without the imposition of those conditions. These condi-
tions do not constitute an affirmative decree against the plaintiff, and
the defendant cannot enforce them against him unless he has counter-
claimed for the relief represented by those conditions. Upon the plain-
tiff's failure to accede, the complaint will be dismissed.

It is unfortunate that many courts consider that their power to grant
conditional relief is dependent on the maxim, "he who seeks equity
must do equity." As a result, these courts have refused to impose any
conditions on a party asserting a defense, even though the effect of the
decree is to give him exactly what would have accrued to him had he
been the party affirmatively seeking relief, at which time these condi-
tions would have been imposed. Moreover, this restrictive view as to
the basis of the court's power has prevented the granting of conditional
relief to the defendant, because the theory of the action was replevin
or ejectment, though the relief would have been given if the theory of
the action was "equitable." Professor McClintock has pointed out that
"the statement that equity jurisprudence has been developed from these

8. Recission may be sought either in an independent action or as a defense to
an action brought on the contract. Where recission is granted, the decree declares
that the contract is abrogated, and the parties are left to their restitutionary rather
than expectancy remedies.
9. Farwell v. Harding, 96 Ill. 32 (1880); Tramonte v. Colarusso, 256 Mass. 290,
152 N.E. 90 (1926). See also the discussion in Nicosia v. Sher, 239 F.2d 456, 457-58
(10th Cir. 1956).
10. See the discussion at notes 44-58 infra and accompanying text.
maxims is historically inaccurate." He also has observed that the principles under which equitable relief would be given were developed long prior to the use of maxims, and that the maxims have little if any utility in themselves. The basic power of any court to administer justice would give it the power to award conditional relief if that is necessary to effectuate a just result. The power to administer justice and not the existence of a maxim justifies the imposition of conditional relief in a proper case. A court having an accurate understanding of the real basis of that power can eliminate many of the undesirable and unsound results that occur in this area.

Although as previously indicated, such relief is particularly appropriate where the remedy sought is of a specific or declaratory nature, the principle is also a part of substantive areas of law which were originally administered by the chancery courts, such as bankruptcy and domestic relations. It is available for the benefit of any party against whom equitable relief is sought. Although an individual defendant may be barred because of his conduct in the particular transaction, a class of defendants is not barred, though their conduct would prevent their obtaining relief in an independent transaction. For example, where a corporate defendant has not complied with the requirements of the doing business statute, which disables it from bringing a suit, it may, nonetheless, have the benefit of conditional relief if the suit is brought against it.

However, the power to grant legal relief is subject to other principles of law. One is that it cannot be used to destroy express contractual rights. For example, in one case the parties entered into a lease under which it was provided that improvements were to become the property of the lessor at the end of the term. At that time they renewed the lease, which contained the same provisions as to future improvements. In the lessor's action to rescind on grounds of incompetency, the lessee was entitled to be reimbursed for improvements made after the second lease was commenced, but not for those made under the former lease. The lessor's right to those became vested at the end of the term, since the former lease was not rescinded. Even though it might have been equitable under the circumstances to require reimbursement for them also, the power to grant conditional relief could not be employed to

12. Id. at 52-53.
13. Larson v. First State Bank, 21 F.2d 936 (8th Cir. 1927).
14. McEntire v. McEntire, 107 Ohio St. 510, 140 N.E. 328 (1923). The right of a tenant in partition proceedings to recover for the reasonable and necessary improvements is also based on this power. Kubina v. Nichols, 241 Wis. 644, 6 N.W.2d 657 (1942).
destroy a vested right. However, a so-called "negative right" under a contract—that the plaintiff only promised to do specific things and not others—is subject to the principle, and the plaintiff may be required to do something other than that which he has expressly promised.\textsuperscript{17} Nor will the power be used to force the plaintiff to relinquish a gift. On this basis, it was held by a California court\textsuperscript{18} that a plaintiff in whose favor a constructive trust arose was not required to reimburse his uncle's administrator for the plaintiff's share of the expenditures made by the uncle for the land, since the evidence did not rebut the presumption that the uncle intended those expenditures as a gift.

Another qualifying principle is that the court cannot disregard res judicata when granting conditional relief. A res judicata determination will bar a relitigation, although conditional relief would have been proper in the absence of the prior adjudication. In \textit{Phelps v. City of Chicago},\textsuperscript{19} the plaintiff sued to remove the clouds created by tax deeds. The city demanded that as a condition to the decree he pay the taxes actually due, which ordinarily is a requirement of such relief. But in a prior ejectment suit against the city, which claimed under the tax deed, judgment was for the plaintiff, and it was a substantive requirement that judgment could not be entered against the holder of tax deeds unless the taxes had been paid. The city could not collaterally attack that judgment under the guise of seeking conditional relief. A similar situation occurred in \textit{Alexander v. Temple},\textsuperscript{20} where a municipality sought to enjoin the defendant from interfering with its use of land that it claimed by eminent domain. The defendant demanded that as a condition to the decree the city pay him for the land so condemned. The court held that he was bound by prior condemnation proceedings in which an award had been made. It was immaterial that the award had not been paid, since the determination in the prior proceedings prevented its relitigation, and the award would have to be enforced under the former decree. Moreover, the defendant may be barred by the election of remedies aspect of res judicata. This was involved in \textit{Weyerhaeuser Timber Co. v. Skaglund},\textsuperscript{21} where the plaintiff sued to enjoin the defendant from interfering with his use of a right of way. The defendant counterclaimed for breach of contract damages, contending that the plaintiff agreed to pay a specified sum for logs transported over the right of way. The counterclaim was dismissed. The defendant then argued that the decree should be conditioned on the plaintiff's paying a reasonable sum for the logs transported. The court held that since the

\textsuperscript{17} See Van Scoten v. Albright, 5 N.J. Eq. 467 (Ch. 1845).
\textsuperscript{19} 331 Ill. 80, 162 N.E. 119 (1928).
\textsuperscript{20} 172 Ark. 611, 290 S.W. 63 (1927).
\textsuperscript{21} 16 Wash.2d 29, 132 P.2d 724 (1942).
defendant chose to base his claim upon a contract, which was rejected, he could not raise the same issue again via a request for conditional relief.

Another limitation on the court's power to grant conditional relief is that it cannot perform a non-judicial function in doing so. In *Cent. Ky. Co. v. Comm'n*, a public utility brought suit against state officials to set aside as confiscatory a prescribed rate for the sale of natural gas. The court found the rate of $.45 per hundred feet confiscatory but conditioned the injunction against enforcement upon plaintiff's accepting a rate of $.50 per hundred feet. Upon the plaintiff's refusal to comply with that condition, the injunction was denied.

The Supreme Court reversed and reinstated the injunction on the ground that since rate-making was a legislative function, the court did not have the power to determine rates and could not impose as a condition the performance of an act which it did not have the power to order. The final decree, of course, was without prejudice to the power of the commission to fix new rates. The Court observed:

District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state and because it is not one within the judicial power conferred upon them by the Constitution.

The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity.

Also, the court must consider the effect of a foreign element in deciding whether to grant conditional relief. As it must consider whether it is practical to issue an affirmative decree affecting foreign interests, so too must it consider the advisability of imposing a condition affecting the same interests, even though the defendant would be entitled

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22. 290 U.S. 264 (1933).
23. Id. at 271-72.
24. The problem is well discussed in *Muller v. Dows*, 94 U.S. 444 (1876). Some of the factors the court considers in determining whether specific relief should be issued despite the presence of the foreign element are as follows: (1) the extent to which all necessary acts can be done in the forum; (2) the extent to which the decree can be enforced against the defendant, *e.g.*, a non-resident having no property in the forum; (3) economic and practical considerations, *i.e.*, is the plaintiff likely to obtain relief in the forum; (4) the likelihood of recognition by other states; (5) the nature of the defendant's obligation, *i.e.*, is it pre-existing; and (6) the extent to which the court must directly act in another state. See also *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1816); *Amey v. Colebrook Guar. Sav. Bank*, 92 F.2d 62 (2d Cir. 1937); *Alexander v. Tolleston Club*, 110 Ill. 65 (1884); *St. Louis Smelting & Refining Co. v. Hoban*, 357 Mo. 436, 209 S.W.2d 119 (1948); *Marquis v. Marquis*, 121 N.J. Eq. 288, 189 Atl. 888 (E. & A. 1937); *Kempson v. Kempson*, 58 N.J. Eq. 94, 43 Atl. 97 (Ch. 1899); *Wimer v. Wimer*, 82 Va. 890 (1886); *Alaska Airlines v. Molitor*, 43 Wash.2d 657, 263 P.2d 276 (1953).
to conditional relief if the foreign element were not present. Thus, where a son sought specific performance of a contract by which the father agreed to convey land situate in the forum, the court would not require the son, as a condition to the decree, to quitclaim his interests in other lands of the deceased father situate elsewhere, as the decedent's will disposing of those lands, was being probated at the situs.\textsuperscript{25}

Finally, the court must give effect to legislation limiting its discretion to grant conditional relief. In an action to set aside a release given for a claim under the Federal Employers Liability Act,\textsuperscript{26} the court may not condition the relief upon a return of the consideration, since the act has been interpreted as allowing the plaintiff to set aside the release without returning the consideration.\textsuperscript{27} Also, if the legislature has provided another remedy for the relief sought to be imposed, which is construed as being exclusive, the court may not grant conditional relief unless the defendant brings his case within the statutory remedy. \textit{Taliaferro v. Colasso},\textsuperscript{28} involved an action to quiet title where the defendant sought reimbursement for improvements as a condition to the decree, which ordinarily is imposed. The court found that the exclusive remedy for the recovery of improvements was furnished by the "betterment act"\textsuperscript{29} and since the defendant's claim did not come within the statute, the court could not require reimbursement.\textsuperscript{30}

However, the court is not prohibited from granting conditional relief, simply because such relief could not be given to the defendant if he instituted affirmative proceedings.\textsuperscript{31} In another case involving an action to quiet title, the court granted a lien to secure repayment of money that the defendant advanced to the plaintiff, his son, to help the latter pay for improvements. The fact that the son had made improvements permitted him to enforce the oral contract, avoiding the bar of the Statute of Frauds. The relief was given the defendant, though there was no contract between the parties, and the father would not have been able to secure such a lien in an independent action.\textsuperscript{32} Also, in New Jersey the court has held that in a suit by a municipality to cancel bonds, it would have to return the consideration received as a condition to relief, though it might have a defense if the bondholders

\textsuperscript{29} These statutes permit recovery in certain instances where under the common law rule they could not be recovered in an ejectment action by the disseised owner. This problem is discussed more fully at notes 339-49 \textit{infra} and accompanying text.
\textsuperscript{30} The statute was limited to good faith improvers and the defendant was a wilful trespasser.
\textsuperscript{31} This is best demonstrated in the case of the non-complying foreign corporation. See the discussion at note 15 \textit{supra} and accompanying text.
\textsuperscript{32} Lindell v. Lindell, 150 Minn. 295, 185 N.W. 929 (1921).
had sued to enforce payment.83 This principle is also present whenever defenses to conditional relief such as the statute of limitations or usury are asserted, and it will be discussed in that context.84 Merely note that the fact that the defendant's claim could not be affirmatively enforced does not, in and of itself, affect the power of the court to make satisfaction of that claim a condition to relief.

It is a requirement that the matter as to which conditional relief is given must form part of the transaction as to which the plaintiff is seeking relief.85 The court will not employ this power to settle every dispute the plaintiff and the defendant might have or to serve the purpose of a general counterclaim. Thus, it has been held that in a suit to establish a resulting trust in real property conveyed to the defendant, the plaintiff would not be required to pay other debts owed to the defendant, unrelated to the property.86 What constitutes a collateral transaction, rendering conditional relief inapplicable, must be viewed in light of the type of relief the plaintiff is seeking. In one case,87 an illiterate plaintiff sued to cancel a deed on the ground that the defendant, his son, had represented that the instrument was a will. Since the deed was analytically void and the relief sought was merely judicial affirmation of this fact, it was held that any payment of outstanding loans on the property by the defendant involved collateral transactions and reimbursement was not required as a condition to relief.

The nature of the remedy sought was also involved in another case,88 where suit was brought to reform a deed to exclude land included by mistake. The defendant did not counterclaim for damages due to misrepresentation but sought conditional relief which would require the plaintiff to compensate him for the land that would now be excluded from his grant. The court refused such relief on the ground that the subject matter of the suit was reformation and that the defendant's claim was not related to the remedy of reformation. The defendant would have had the same claim even if the deed had been correctly drawn.

Further difficulty arises in situations where additional action was taken in reliance on the transaction as to which relief is later sought. In Mahoney v. Bostwick,89 the plaintiff sued to have a deed absolute declared a mortgage. Following the giving of the instrument, the plain-

83. Lodi Township v. Little Ferry Nat'l Bank, 121 N.J. Eq. 213, 189 Atl. 58 (Ch. 1937).
84. See the discussion at notes 253–68 infra and accompanying text.
85. The same requirement is present when the court applies the clean hands doctrine. Where the unclean hands are with respect to a "collateral transaction," the court will not refuse relief on that account. McClintock, op. cit. supra note 11, at 63. See Harris v. Harris, 208 Ala. 20, 93 So. 841 (1922).
89. 96 Cal. 53, 30 Pac. 1020 (1892).
tiff had given a mortgage on future crops as additional security for the loan secured by what plaintiff claimed was a mortgage. It was held that the defendant was not entitled to reimbursement for expenditures and advancements made in reliance on the additional security, since the subject of the suit was only the first instrument.

The question of what constitutes a collateral transaction becomes compounded whenever the interest of a third party is involved. This problem was presented in a recent Georgia case where an incompetent grantor sued to set aside the deed given from his grantee to the defendant. It was held that the grantor was not required, as a condition to the decree, to reimburse the defendant for the consideration paid to his grantor. The court admitted that the grantor would have had to return the consideration to his grantee if he were the defendant, but held that the absence of a prior relationship between the plaintiff and this defendant relegated the relief sought to that involving a collateral matter. Although the decision may be analytically correct insofar as it characterizes the transaction as collateral, it is submitted that since the plaintiff would now have to return the consideration to his grantee, the defendant should have been subrogated to the latter's rights. Requiring payment of the plaintiff then would avoid circuity of action, since under the court's approach the defendant would have to recover the consideration from his grantor, who in turn, would have to proceed against the plaintiff.

On the other hand, where foreclosure of a mortgage was sought, the court looked to the entire transaction, of which the mortgage was the base, in determining the collateral character of the matter as to which the defendant sought relief. In City Investing Co. v. Davis, the plaintiff sued to foreclose a chattel mortgage under which the corporate defendant pledged all its stock as security for a loan. The loan was also to be secured by a mortgage on land, which was to be jointly developed and the proceeds credited toward satisfaction of the debt. The land was sold when the venture proved unproductive. It was held that as a condition to foreclosing the chattel mortgage the plaintiff would have to credit the proceeds received from the sale of the land and also credit the defendant with its payment of a first mortgage on the land pursuant to agreement, as well as the expenses of maintenance and sale. The court found that all the activities were part of a single transaction.

A very close question of similar import was presented in a suit to foreclose brought by the personal representative of the deceased mortgagor. The mortgagor was a physician, who had been a close personal friend of the mortgagor. Over the years the mortgagor had never charged the decedent for medical services, and any claim for these serv-

41. 334 S.W.2d 69 (Mo. 1960).
ices would have been barred by the statute of limitations. The court held that the defendant had failed to prove that the decedent agreed to accept medical services in satisfaction of the debt. However, it did condition the granting of foreclosure upon payment for those services, saying that the defendant had "an adverse equity arising out of the transaction before the court."

Although the result may seem a far extension of the concept of the "same transaction," in actuality it is justifiable. What the court was really doing was relieving against a unilateral mistake. The defendant probably did think that the services were in satisfaction of the debt. Though the proof was insufficient to show that the decedent had agreed, the court realized that had the decedent lived, he probably would not have foreclosed against his friend of long standing. The result comports with what the decedent probably would have wanted—if the physician could not keep the land in exchange for the services, then he would have wanted him to have been paid for the services.

What constitutes the same transaction is necessarily a difficult question to determine and no general principle can be stated. However, it does appear that to the extent the plaintiff seeks a narrow remedy such as reformation or declaration of the status of an instrument, the court is less likely to examine the broader aspects of the transaction and award conditional relief. When the remedy sought would terminate the transaction, as foreclosure, then the court is more likely to explore the ramifications and attempt to settle the conflicting interests created by the original transaction. The court should always be careful to avoid using its power to condition relief as a substitute for counterclaims and should not attempt to settle all the aspects of a controversy when only a portion is before it.

At this juncture it is incumbent to consider the availability of conditional relief against a party defendant who is not seeking affirmative relief. Courts who base their power upon the "he who seeks equity" maxim are particularly prone to ignore the realistic effects of drawing the affirmative-defensive relief distinction, with the result that a party may actually obtain relief, but avoid compliance with fair conditions simply by waiting to be sued.

An extreme demonstration of the fallacy inherent in such an approach occurred in Connecticut General Life Ins. Co. v. Benedict. The insurer instituted an interpleader action against the prior designated and substituted beneficiaries, both of whom claimed the proceeds. The prior beneficiary argued that the assignment of the policies and the change of beneficiary were void, since they were to furnish

43. The court apparently did not consider whether the defendant was barred because of an election of remedies. Cf., Weyerhaeuser Timber Co. v. Skaglund, supra note 21.
44. 88 F.2d 436 (2d Cir.), cert. denied, 301 U.S. 694 (1937).
security for a usurious loan. The court agreed with this contention and held that the prior beneficiary was entitled to the proceeds. However, it refused to require him to repay the loan given to the insured, even though had he instituted independent proceedings for cancellation, he would have been required, according to the court, to do so. Under the substantive law he succeeded to the liabilities as well as the rights of the insured. The court said that since the prior beneficiary did not seek affirmative relief, conditions would not be imposed—since he did not apply for cancellation, he would not have to “do equity.”

However, the prior beneficiary received the same benefits as if he had sued for cancellation. It should be immaterial that he “defended his title,” since when a party asserts a right to rescind as a defense to an action on the contract, he is required to return the consideration under the same circumstances as when he brings affirmative proceedings. It is no answer to say that there he is getting the “affirmative relief” of rescission, since the same result is obtained in the interpleader proceedings. The court also observed that where the plaintiff is a stakeholder the claims are “legal” instead of “equitable.” By making an adverse claim, thereby forcing the insurer to bring interpleader proceedings in order to protect itself, the prior beneficiary can effect cancellation of the change (though it is not called such) without reimbursing the substituted beneficiary, though otherwise he could not avoid this condition. Whether a party should be able to obtain the proceeds of an insurance policy without reimbursing the substituted beneficiary whose claim he has defeated should not depend on whether the theory of the claim is “legal” or “equitable” or whether he is seeking “affirmative” or only “defensive” relief. The power of the court to impose fair conditions on the granting of relief should not depend on the theory of the claim where the claimant obtains the same benefits under either theory.

There are other situations where a court actually grants relief to the defendant without requiring performance of conditions which it would require if he sued to obtain the same relief. In First Trust & Sav. Bank v. Iowa-Wisconsin Bridge Co., suit was brought to foreclose a trust deed securing corporate bonds, and the corporation defended on grounds of fraud. The court denied foreclosure on those grounds but refused to require the corporation to return the consideration it had

45. He could have done so, since he was adversely affected by the change of beneficiary. This standing is recognized apparently, even though the prior beneficiary gave no consideration for the designation.

46. See Wheelock v. Lee, 64 N.Y. 242, 246 (1876); Brown v. Robinson, 224 N.Y. 301, 120 N.E. 694 (1918). The court was applying New York law.

47. Note that a party against whom a contract is sought to be enforced can counterclaim for a decree of rescission; it is then as if he instituted an affirmative action.

48. 98 F.2d 416 (8th Cir. 1938), cert. denied, 305 U.S. 650 (1938).
received from the bondholders as a condition to the decree. Since the decree did not order the deed rescinded, the defendant obtained no affirmative relief as such. But declaring the security interest unenforceable on grounds of fraud has the same result as cancelling it. We see then that the result again depends on whether the obligor waited to be sued—in which case he does not have to return the consideration in order to avoid enforcement—or brought independent proceedings. Such a distinction is absurd since the obligor obtains, in effect, identical relief. Since the obligation is substantively unenforceable, it is as if it were cancelled; all that is lacking is a formal decree of cancellation. Moreover, the bondholders could recover the consideration in a separate proceeding—two suits are necessary to accomplish what could be done in one were the court not bent on preserving the distinction between affirmative and negative relief and laboring under a mistaken view as to the nature of its power to impose conditions. Such an approach is of no utility under a merged system of law and equity.

In Bavisoto v. United States,49 the court permitted the insurer to defend a suit for monthly payments due to total disability on grounds of fraud without requiring return of the premiums paid. Assuming that the premiums were not forfeited due to the fraud,50 the decision again effectively permits cancellation, as the policy is now unenforceable, and requires a second action to recover the premiums. And in Mortgage Sec. Corp. v. Levy,51 the court refused to enforce a usurious mortgage without requiring payment of the debt and lawful interest as a condition, though it would have required such payment if the mortgagor brought suit for cancellation.52 The mortgagor did counterclaim for cancellation, which claim the court denied, and in doing so (this may have been its intention) actually benefited him. Again, the result is as if the mortgage had been cancelled, since it is unenforceable. The court effects cancellation without a formal decree and relieves the mortgagor from satisfying a requirement it would have imposed if he had received such a decree.

On the other hand, it is not contended that conditional relief be imposed in order to permit the assertion of a defense where the result of allowing the defense is not the same as it would be if the defendant sought affirmative relief. This distinction is evidenced in suits to quiet title to land. Thus, where plaintiff claimed title by virtue of a tax deed, and the defense was that the deed was invalid due to noncompliance with statutory requirements, the court did not require the defendant to pay the taxes owed in order to question the deed's validity.53

50. This is generally not permitted by state insurance laws.
51. 11 F.2d 270 (5th Cir. 1926).
52. As to whether this is required in order to assert a homestead defense, see the discussion at notes 271–82 infra and accompanying text.
court emphasized that the defendant would not be entitled to a judgment decreeing title in him due to the invalidity of the deed without paying such taxes, and that he was not getting such relief. Here the action to quiet title was a quasi in rem proceeding, and the question was whether the plaintiff had good title as against the defendant. The effect of the decree was to hold that the plaintiff did not have a good title against the defendant; it did not hold the converse, that the defendant had a good title against the plaintiff. The matter remained in status quo. If the defendant would want title declared in him, he would have to pay the taxes, which the court should not require him to do until such time, if ever, as he wants this declaration. But in another case where the residuary legatee sued to set aside a deed from the testator, and the court upheld the validity of the deed, the decree effectively quieted the defendant's title against the plaintiff, so that the court imposed certain conditions upon the defendant. The defense was such that it could not be recognized without holding that the property did not pass under the residuary clause of the will. This meant that the plaintiff could not take it, and the defendant's title was good as against him.

Another case where conditions properly were not imposed upon the assertion of a defense was Estes v. Metropolitan Life Ins. Co. In that case the mortgagee sued for declaratory relief that the instrument was a mortgage and also sought to set aside a prior sale. As a defense the mortgagor asserted that the security was given on homestead property and claimed the homestead exemption. Under the statutory procedure, when such a claim was made, the court would order a sale, deduct the amount of the exemption, and the remainder would be paid to the creditor. The court held that the defendant could obtain the exemption without paying the mortgage debt, although if he had sued to cancel the mortgage, because given on homestead property, he would have had to comply with that condition.

Although the court talked in terms of the defendant's not "being the actor in equity," closer scrutiny indicates that this was not the real basis of the decision. The mortgagor did not obtain the same result as he would have upon cancellation. Where a mortgage on homestead was issued without compliance with the statute, the mortgagor had an election. He could obtain cancellation or give up the property by permitting enforcement of the mortgage subject to the statutory exemption. He chose the latter course here but could have accomplished the same result by filing a petition in an independent action or at any time that the mortgagee sought enforcement. In neither instance would the mortgagor have to pay the debt in order to obtain the exemption.

55. 232 Ala. 656, 169 So. 316 (1936).
Upon cancellation it is proper that he return the consideration—assuming that the state's policy does not militate against the return in such a case—since the mortgagee then loses his security. However, when the exemption is obtained, the mortgagee receives the proceeds of the sale after deduction of the exemption. Payment of the debt should not have been required here because actually the mortgagor was not obtaining cancellation; this is the real reason for not requiring payment, not that the mortgagor was not the party seeking affirmative relief.

It is submitted that the court should look to the practical effect of the decision in determining whether conditional relief should be required rather than to the formal position of the party against whom such conditions are sought to be imposed. Where the party obtains the same actual relief by asserting a defense as he would if he brought an independent action, the same conditions should be imposed upon him as would be in the independent action. So too, when the plaintiff's suit is dismissed due to the defendant's defense, and the plaintiff could recover the relief he seeks in an independent proceeding, the court should impose such relief as a condition to dismissal in order to avoid circuity of action even absent a counterclaim. It is the result that the court accomplishes by its action rather than the position of the parties that should determine whether conditional relief is proper. It is hoped that the courts will apply the same approach employed in the quieting title cases to those where the effect of the decision is to accomplish cancellation, even though no formal decree is entered, and to the other instances where the defendant obtains the same result by asserting the defense as he would if he had instituted independent proceedings.

Before considering the substantive doctrine of conditional relief, it is necessary to make a few observations about procedural matters. In the first place, such relief can be granted, even though the defendant does not ask for it in his pleadings, since the court is exercising an inherent power. The next question is when must the plaintiff actually make a tender of money into the court, where the condition involves such payment? In suits to enjoin the collection of taxes, in which it is a condition that plaintiff pay taxes admittedly due, the plaintiff must have either paid the taxes or tender the money as a condition precedent.

56. See discussion at notes 271-82 infra and accompanying text.
57. See also Federal Discount Corp. v. Rush, 269 Mich. 612, 257 N.W. 897 (1934), where as a matter of substantive law refusal of a valid tender destroyed the lien, so the mortgagor could resist foreclosure on that ground. There too, it was immaterial that the mortgagor did not seek affirmative relief, because the same result should accrue if he had done so.
58. Or it could permit amendment of the pleadings to hear the claim for relief.
60. For when this is required, see the discussion at notes 116-25 infra and accompanying text.
to suit.61 Because of the interference with the governmental process that is involved the court will not hear the claim absent such tender. The requirement of an actual tender also exists where a party is required to return the consideration in order to set aside a release.62

Where an amount may be owing, but it cannot be determined until trial, of course, no tender can be required. Where a liquidated amount is owing, such as on a security instrument, and payment would be required as a condition to relief, the general rule is that an actual tender is not required prior to the court's hearing the case.63 Research has disclosed only the Georgia courts as requiring a tender in that situation,64 and even this may not be required if there is an attempt to set off.65 Some courts do, however, require that the pleadings contain an offer to "do equity," 66 while others dispense with even this requirement.67 Moreover, amendments are generally permitted where such an offer is required, since the offer is not considered a condition precedent to suit.68 Plaintiff's counsel should always offer to "do equity" whenever equitable relief is sought, in order to avoid procedural questions which may delay the trial.

B. Substantive Application

1. Avoiding the effect of improper conduct

In one area the existence of the doctrine rebounds to the benefit of the plaintiff, since it enables him to avoid the bar of a defense arising from his improper conduct. In the absence of its power to condition relief, the court would have to recognize the defense and deny any relief. In the first place, conditional relief can be used to repair a breach of contract, where the breach would otherwise bar the action.

61. City and County of Denver v. Hallett, 45 Colo. 132, 100 Pac. 408 (1909); Irwin v. Pearson, 204 Ga. 685, 51 S.E.2d 420 (1949).
62. See the substantive discussion at notes 156-87 infra and accompanying text.
63. See, e.g., Tyler v. Morgan, 214 Ark. 667, 217 S.W.2d 606 (1949).
68. Coburn v. Coke, 193 Ala. 364, 69 So. 574 (1915); Oceanic Villas v. Godson, 148 Fla. 454, 4 S.2d 689 (1941).
By granting conditional relief the court can enforce a contract and protect the interests of both parties; otherwise the contract would fail. In *Burlington Sav. Bank v. Rockwell*, the plaintiff sued to foreclose on certain collateral security. The defendant answered that the note for which the security was given was executed as part of an agreement under which plaintiff was to obtain title to certain lands by foreclosure and escrow the land as security for the payment of the defendant's debt, which he failed to do. The intention was that the obligation would be repaid from the profits of the land during the period of the obligation. Since the plaintiff had failed to put the lands into escrow, the court held that he could not foreclose and entered a decree cancelling the pledge.

The appellate court reversed and ordered the plaintiff to escrow the land as he agreed to do and to account. On the accounting the plaintiff would be credited with the amount of its decree against the escrowed property, the cost of foreclosure, payment of taxes and the expense of maintenance. He would be charged with whatever he had received from the sale of a portion of the land and the income. The decree also ordered sale of the land and the collateral, which was the relief the plaintiff originally sought. First, the surplus arising from the sale of the land was to be applied to satisfaction of the indebtedness and then the proceeds from the sale of the collateral. The result of the decision was to fully enforce the contract as originally made instead of refusing enforcement and leaving the parties to their restitutionary remedies.

In *New Jersey Title Guar. & Trust Co. v. Croydon Holding Corp.*, the court set aside a void foreclosure sale, even though it was due to the plaintiff's improper conduct that the sheriff had the opportunity to conduct the sale. The plaintiff was the highest bidder at the first foreclosure sale, which was properly conducted, but did not pay the bid. The sheriff then resold the land, which was improper under the circumstances. The sheriff then resold the land, which was improper under the circumstances. When the bidder sued to have the second sale set aside, it

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69. 31 F.2d 27 (9th Cir. 1929).
70. The same approach was taken in *Valley Smokeless Coal Co. v. Manufacturers Water Co.*, 302 Pa. 232, 153 Atl. 327 (1930), where the grantor sued to compel the grantee to remove a pipe line on the ground that the latter did not furnish lateral support as required by the contract. In the alternative he sought to require such support. The defense was that the grantor breached his part of the agreement to maintain support at existing levels by engaging in excessive cutting. The court found that the cutting was not intentional and gave relief conditional on the grantor's repairing the damage. The decree gave the grantee the option of furnishing support, conditional on the grantor's repairing the damage or removing the pipe line. Thus, the decree adequately protected the interests of both parties by enforcing the contract instead of "leaving the guilty parties where it found them." Assuming it to be in the public interest to enforce all contracts not tainted by illegality, then the result is more desirable than refusing relief because of the plaintiff's breach.
71. 138 N.J. Eq. 263, 46 A.2d 564 (Ch. 1946).
was argued that he was barred, since his conduct made the second sale necessary. The court voided the second sale and ordered the property re-advertised conditional on the plaintiff’s making an initial bid equivalent to its bid at the first sale and furnishing security to cover the costs of both sales. Again the interests of both the plaintiff and the public were fully protected by the decree.

The area in which this power can most profitably be used is that of the clean hands doctrine. The plaintiff may be barred by unclean hands due to conduct with respect to the transaction which was either improper as to the defendant or which injured the public. Many courts simply refuse to grant any relief on the ground of unclean hands without considering whether the improper conduct can be remedied and the relief then given. The court is “punishing” the plaintiff for his improper conduct by refusing him relief to which he would otherwise be entitled. Some courts, however, have recognized that the interests of all parties and the public can be better protected by granting relief conditional on the plaintiff’s eliminating the improper conduct where it is not too late to remedy the injury.

The Pennsylvania courts have been particularly astute in this respect, granting relief both where the improper conduct affected the defendant and where it injured the public. In *Comstock v. Thompson*, the plaintiff sued to recover his interest in land held by the defendant, which the plaintiff managed. The defense was that the plaintiff was barred by unclean hands, since he had improperly diverted a sum of money involving the land, which, however, was small in comparison with his interest. The court did not dismiss the complaint, but instead ordered the plaintiff to produce within a specified time all papers relating to the management of the land and to make restitution of the improperly diverted funds. If this were done, the court would then hear the case on the merits. The decree protected the interests of both parties.

The leading case involving the use of conditional relief to prevent the operation of the clean hands doctrine is considered to be *Hartman v. Cohn*. In an action to enjoin the use of the plaintiff’s trade name the defense was that the plaintiff had engaged in false advertising with respect to the business protected by the trade name. The plaintiff referred to the business as “Dundee Woolen Mills” and advertised that

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72. See, e.g., Memphis Keeley Inst. v. Leslie E. Keeley Co., 155 Fed. 964 (6th Cir. 1907); Ilo Oil Co. v. Indiana Natural Gas & Oil Co., 174 Ind. 685, 92 N.E. 1 (1910). In Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1941), the Court indicated that after the plaintiff eliminated the improper conduct, he could then obtain relief in another suit. Cf., Standard Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947). In some instances the nature of the plaintiff’s conduct is such that he cannot repair the harm. See, e.g., Carmen v. Fox Film Corp., 269 Fed. 928 (2d Cir. 1920). See generally CHAFEE, SOME PROBLEMS OF EQUITY 23 (1950).

73. 286 Pa. 457, 133 Atl. 638 (1926).

74. 350 Pa. 41, 38 A.2d 22 (1944).
there were "no middleman's profits." The plaintiff did not represent any woolen mill, and that statement about the middleman was unjustified. The court granted relief prohibiting the appropriation of the plaintiff's trade name conditional upon the plaintiff's eliminating the word, "mills," from its advertising and ceasing to use the slogan, "no middleman's profits." Here the public interest in fair advertising and that of the defendant in fair competition were protected by the decree, and the defendant's improper conduct was ordered discontinued.

An interesting approach was taken in a New Jersey case where the plaintiff, seeking to restrain the use of a secret formula and trademark infringement, was guilty of mislabelling. The label listed ingredients that the product did not contain. These ingredients did not have medical properties and were inserted by the plaintiff's predecessor; the plaintiff had not re-examined the product. The court said that under the circumstances the plaintiff was not barred by unclean hands. However, it then said that it could not permit misbranding and granted relief only on condition that the plaintiff eliminate the misbranding. The court here used its power to protect the public, even though the plaintiff would not have been barred from such relief absent the imposition of the condition. The court's observations are applicable to any situation where improper conduct on the part of the plaintiff is found:

On the contrary it [defendant's position that plaintiff should be barred] would simply result in dismissal of the proceeding without correction of the mislabelling and permit the defendants to go scot-free despite their established appropriation of the plaintiff's property. We fail to see how this result would serve to protect the public or satisfy the true ends of equity. . . . The conditional injunction will here furnish, as a practical matter, adequate protection to the public, rightly hold the defendants fully accountable for their now disputed wrongdoing and afford to the plaintiff the measure of relief to which it appears justly entitled.

The use of the conditional decree can be particularly effective in enforcement of fair-trade agreements where the manufacturer has been lax in enforcement against other violators. This technique was employed to enforce such an agreement in General Elec. Co. v. R. H. Macy & Co. Macy's had been observing fair-trade prices even while the

76. This statement is not strictly true, since the plaintiff could recover damages if he could prove them. Also, since equitable relief was affirmatively proper, the court could have awarded damages without a jury. See West Pub. Co. v. Edward Thompson Co., 176 Fed. 833 (2d Cir. 1910), where the plaintiff was barred by laches, but the court awarded partial damages in lieu of an accounting for total loss of profits.
78. 199 Misc. 87, 103 N.Y.S.2d 440 (Sup. Ct. 1951).
discount houses were selling at prices below the fair-trade minimum. Eventually it attempted to meet the prices of the discount houses. At this time General Electric began to enforce the agreements as to appliances and sued to enjoin Macy's from selling below the prescribed price. The defense was unclean hands on the ground that G.E. had been guilty of sporadic and lax enforcement against others, particularly the discount houses, and allowed a subsidiary to retail such products at lower than the fair-trade price. The court granted the injunction conditional on G.E.'s vigorous enforcement against others who sold below fair-trade prices. Under the terms of the decree the following conditions were imposed upon G.E.:

(1) It was to keep itself informed of price-cutting activities by retailers.

79. The court stated:

The question is whether the early lapse by General Electric from vigorous enforcement should act as a forfeiture and bar it for all time from enforcing its Fair Trade agreements. The adoption of such a principle would not carry out the purpose of the Legislature, but would make the maintenance of Fair Trade price structures extremely difficult. Nor would such a decision serve the best interests of the parties in this action. The preservation of the Fair Trade price structure in this case, provided it is reasonably and diligently enforced, would carry out the legislative policy and preserve the rights of General Electric in protecting its good will, while at the same time not prejudicing the rights of Macy in any way. Macy did not object to the maintenance of Fair Trade prices; on the contrary, the evidence shows it maintained such prices scrupulously for a long period of time, even when the discount houses were cutting prices. What Macy did object to was the ineffective enforcement which allowed the less conscientious discount houses to cut prices and thus put Macy at a competitive disadvantage. The evidence shows that even the price cutting by Macy was not an attempt to destroy the Fair Trade price structure but, rather, to require General Electric to enforce this structure effectively or abandon it. There is no doubt that Macy suffered a real economic disadvantage and made the decision to force the issue by cutting prices in complete good faith. General Electric has responded with a vigorous enforcement program which leaves no doubt as to its will to enforce its Fair Trade prices against all violators. The question in this case, therefore, is not primarily a question of right or wrong. Neither of the parties has engaged in any unconscionable activities. The question is, rather, one of working out an equitable adjustment of a business relationship.

To refuse an injunction in this case would result in irreparable injury to General Electric, since it would in effect render all of its existing Fair Trade Agreements unenforceable and would result in the collapse of its existing price structure. To grant an injunction, providing the Fair Trade Agreements are fairly and effectively enforced, would work no hardship on Macy. In the interest of an equitable solution, therefore, an injunction will be granted to the plaintiff, conditioned on the continuation by it of its present vigorous enforcement activities. This condition is intended to give Macy the greatest possible protection against any further detriment resulting from a future lapse by General Electric. The conditioning of an injunction on future behavior of the plaintiff has been employed by the courts as an effective and advisable way of giving the plaintiff relief while at the same time protecting the defendant against any future lapses in conduct by the plaintiff.

Id. at 97, 103 N.Y.S.2d at 451.
It was also to keep close scrutiny on prior violators and take appropriate action.

(3) It was to investigate and follow up every complaint vigorously.

(4) It was to take legal action if necessary and generally insure continued and sustained enforcement.

It is interesting to note that following such decree G.E. moved to vacate the judgment and dismiss the complaint, which motion the court granted.

By issuing such a decree the court protects a manufacturer who has failed to enforce the fair-trade agreements in the past but who now desires to do so. At the same time, it insures the defendant that if the decree is to be enforced against it, it will be enforced against all other retailers, and the defendant will not suffer price-cutting competition, which it is prohibited from meeting by lowering its price. Indeed, every decree in the fair-trade area should be conditional upon the plaintiff's continued enforcement against other violators. In the main case, either G.E. worked out a settlement with Macy's or it decided that it did not want to be burdened with enforcement against others. What it really may have been trying to do was to protect its reputation in the department stores and at the same time permit discount houses and the like to sell appliances at prices lower than the department stores. Such conduct should not be permitted by the court, and a conditional decree prevents this possibility.

Conditional relief has also been used to settle rights of persons with respect to the use of the same or adjoining property where each has been guilty of some misconduct with respect to the property. In Tehan v. Sec. Nat'l Bank of Springfield, the plaintiff had an easement of passage over a right of way abutting the defendant's property. The defendant operated a drive-in bank, and a window protruded about six feet over the right of way, rendering it very difficult to use. However, the plaintiff's fire escape on its adjoining property also blocked the right of way. The plaintiff had offered to remove the obstruction, but the lower court held that its presence was a bar to the plaintiff's claim. The decision was reversed, and the injunction was granted conditional upon the plaintiff's removal of that portion of the fire escape that was below the usual height for vehicles. The court also held that the plaintiff could build a fire escape which could be raised and lowered to permit the passage of vehicles. The decision thus seeks to obtain a practical and beneficial result and does not penalize "guilty parties."

The same principle has been applied to adjust a dispute between holders of upper and lower riparian rights. The owner of upper riparian rights sued to enjoin the owner of the lower estate from ob-

structing the natural flow of water, causing it to back up on plaintiff's land. Plaintiff dug ditches to drain his barnyard and to carry water from a culvert on the highway to a natural depression on his land, where it then passed in increased volume to the defendant's land. The defendant claimed that there was no difficulty until the plaintiff dug the ditch. The court ordered the defendant to remove the dams which obstructed the natural flow and the plaintiff to close the ditch. 83

The court will also use the conditional decree to protect a party from the effect of foreclosure despite his breach 84—it is really giving the old remedy of equity of redemption, so a party in default could seek this relief as plaintiff—where it finds the breach excusable, though still entitling the other party to foreclosure. Thus, one court permitted the tenant who was in arrears, but who had not willfully breached, to avoid enforcement of a judgment for repossession upon payment of the accrued rent and rent due together with interest. 85 And in another case 86 where the vendee of land was in arrears on the purchase price but the court found that he did not receive what it considered adequate notice of the vendor's intention to foreclose, though no notice was required by the contract, it gave the vendee a reasonable time to pay the balance of the debt, which had become accelerated, before ordering foreclosure. 87

In Whitaker & Co. v. Sewer Improvement Dist. No. 1, the district sued to foreclose liens for delinquent assessments against lands of residents, which had not been redeemed within the five-year statutory period. Creditors of the district intervened, asking that the parcels acquired by the foreclosure be sold and applied to the debts. There was evidence that the owners of the parcels had been led to believe that the foreclosure proceedings were invalid, though, in fact, they were not. The court refused to require the owners to issue deeds to the lands, even though the prior foreclosure proceedings were valid. It told the district to compute the delinquencies with interest, publish these amounts and give the owners the opportunity to redeem within ninety

83. The same result could have been accomplished in Ilo Oil Co. v. Indiana Natural Gas & Oil Co., supra note 72, but the court did not consider its power to do so. It preferred to "leave the guilty parties where it found them." The factual situations in these cases were quite similar.

84. It is another "maxim of equity" that "equity abhors a forfeiture." McClintock, Equity 52 (2d ed. 1948) does not list this as one of the maxims, but some courts have done so. See, e.g., Johnston v. American Fin. Corp., 182 Okla. 567, 79 P.2d 242 (1938). This was apparently the way by which the court described its power to grant equity of redemption. For a general discussion of forfeitures see McClintock, op. cit. supra, at 83.


87. Here, where the price was $36,250 and the purchaser had paid over $20,000 in interest and principal, he was given a year to pay the balance of $20,000.

88. 229 Ark. 697, 318 S.W.2d 831 (1958).
days. The court emphasized that the creditors were not injured by the decree—either the parcels would be redeemed and the money paid in or the land would be sold. Under the court’s approach the creditors could be satisfied without requiring the owners to lose their land.

In summary, it can be said that the court should always see if the interests of all parties and the public can be protected by a conditional decree instead of refusing to grant any relief because of the plaintiff’s misconduct. The basic purpose of civil litigation is to compensate and remedy rather than to make people “good” and punish them for “being bad.” A remedial view of law recognizes the law’s inability to “make men angels.” Often, both parties to a transaction have been guilty of some improper conduct. Society’s interest is better protected by remedying the harm caused by that conduct than by turning a party out of court in hopes that he will improve himself in the future. Rather than two wrongs co-existing, e.g., trademark infringement and false advertising, the court can eliminate both by issuing a conditional decree. The courts have been slow to recognize their power in this respect and too often tell the plaintiff to “come back after you have reformed” or “you are barred from any relief because you have acted improperly.” It should adjust conflicting interests in a single action and eliminate insofar as possible any harm that may have resulted from improper conduct. Professor Chafee’s remarks as to the clean hands doctrine are applicable to all areas of improper conduct:

The clean hands maxim might be further assimilated to the maxim, “He who seeks equity must do equity.” 80 The relationship between the two is fairly close. . . . The clean hands maxim relates to the past and the doing equity maxim relates to the future. Still, when the plaintiff’s misconduct seems likely to continue unless stopped, we are really dealing with the future here, too. Instead of dismissing A’s equity suit because of the past, it might sometimes be more useful to the community to offer him an injunction on condition of his behaving more properly henceforth.90

2. Recovery of expenditures made by party required to surrender property or benefits

Where the plaintiff seeks equitable relief to require the defendant to return property or surrender the benefits of a transaction, the defendant is generally entitled to reimbursement for expenditures to the extent that such expenditures have benefited the plaintiff. This is required in order to prevent unjust enrichment. The benefits to the

80. It is unfortunate that Professor Chafee chose to talk in terms of maxims. It is that type of verbalization that can cause confusion, since courts may think that their power to grant relief is based on what maxims they can find.
80. CHAFEES, op. cit. supra note 72, at 100.
91. See the discussion as to whether this is required when the theory of the plaintiff’s claim is “legal” at notes 339-49 infra and accompanying text.
plaintiff can arise in a number of ways. One situation is by payments to third parties or obligations incurred as to them. In Chance v. Geldreich,\textsuperscript{92} the arrangement was that the landlord was to convey the land to the tenant, the tenant was to apply for a "G.I." loan, for which he was eligible, and then he was to reconvey the land and remit the proceeds to the landlord. As consideration the tenant was to get a year's free rent. The tenant, however, did not reconvey, but instead conveyed to the defendant, who knew of the entire transaction. In a suit by the landlord against the tenant and his grantee to have both deeds removed as clouds on the landlord's title, the court required, as a condition to relief, that the tenant be reimbursed for the amount he had borrowed and be given a lien on the land for that amount.

In another case the president of a corporation was held to be a constructive trustee of the proceeds of common stock which he held under a void agreement. However, since he was required under the agreement to apply some of the proceeds to retiring preferred stock and had done so, he was entitled to be reimbursed for the amount paid to the preferred shareholders.\textsuperscript{93} So too, where the defendant had obtained property from the plaintiff in breach of his fiduciary obligation, he was entitled to be reimbursed for reasonable expenses incurred in perfecting title.\textsuperscript{94}

The most common situation is where real property is surrendered and the defendant is entitled to reimbursement for the making of beneficial improvements to the extent they have enhanced the value of the land: payment of taxes, reduction of outstanding encumbrances and the like.\textsuperscript{95} Here, since the defendant will be liable for the rental value of the land during his occupancy and any mesne profits, the question is often as to what he can deduct on the accounting. Still, if any balance is found owing against the plaintiff, he must pay it as a condition to the decree. This type of adjustment is illustrated by Godzieba v. Godzieba,\textsuperscript{96} where the husband sued to have a resulting trust in land declared for him and his wife as tenants by the entireties. Funds belonging to both were used to purchase property and convey it to their

\begin{itemize}
\item \textsuperscript{92} 337 S.W.2d 770 (Tenn. App. 1959).
\item \textsuperscript{93} Martin v. Luster, 85 F.2d 833 (7th Cir. 1936), cert. denied, 300 U.S. 667 (1937).
\item \textsuperscript{94} Bryant v. Vance, 33 Tenn. App. 120, 230 S.W.2d 198 (1950).
\item \textsuperscript{95} Cahill v. Bryan, 184 F.2d 277 (D.C. Cir. 1950); Smith v. Smith, 167 Ga. 368, 145 S.E. 661 (1928); Bonninghausen v. Hansen, 305 Mich. 595, 9 N.W.2d 856 (1943); Eckelmann v. Luecking, 344 Mo. 979, 130 S.W.2d 471 (1939); Blachowski v. Blachowski, 135 N.J. Eq. 425, 39 A.2d 94 (Ch. 1944); Suburban Home Mortg. Co. v. Hopwood, 83 Ohio App. 115, 81 N.E.2d 387 (1948); McIndoo v. Brown, 125 Okla. 88, 256 Pac. 743 (1927); Chance v. Geldreich, \textit{supra} note 92.
\item \textsuperscript{96} 393 Pa. 544, 143 A.2d 344 (1958).
\end{itemize}
son who was to hold for the benefit of both, but who wrongfully conveyed to the wife. As a condition to the decree, the husband had to pay to the wife an amount equal to one-half the expenditures made by her for taxes, mortgage and insurance payments, and necessary repairs, plus one-half of the excess of the value added to the property by necessary improvements over the value of the use made by the defendant.97 Reimbursement for the value of the improvements and the like is required, even though the plaintiff is not required to return the consideration upon recission due to his not receiving it,98 or is not required to pay a forfeited debt in order to quiet title to mortgaged land.99

The plaintiff is also required to reimburse the defendant for the value of partial benefits received, even though the defendant is in breach. Thus, in Thomas v. Brownsville, Ft. K. & Pac. R.R.,100 stockholders who sued to prevent foreclosure of construction bonds issued in payment for work to be done by a contractor who defaulted, were required to pay the bondholders the sums actually expended by the construction company for the work it did; the bondholders were subrogated to the rights of the company.101 In Jersey Acres v. City of Paterson,102 the plaintiff as a condition to a decree removing a contract for the installation of sewers as a cloud on realty had to pay the value of the benefits which inured due to partial installation, even though the work was not completed. And similarly where a plaintiff seeks to cancel an invalid mortgage, he is required to pay to the holder such amounts

97. Such adjustments have been made in other cases so that the defendant could be reimbursed. In Parker v. Stephenson, 127 Va. 451, 104 S.E. 59 (1920), an infant sued to set aside a deed of sale, because the proceedings were ineffective. The property was charged with a lien to the extent of the interest of the infant as to the purchase price received by him plus the enhancement in value due to improvements, tax payments and insurance payments. Of course, the vendee was charged with the rents and profits during the period of occupancy. See also Stanko v. Males, 390 Pa. 281, 135 A.2d 992 (1957).

98. Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940). Plaintiffs were the heirs of the grantor of an invalid conveyance. Since they did not receive any of the consideration, they were not required to return it. But since they did receive the property, they were required to pay for its enhanced value.

99. Swingley v. Riechoff, 112 Mont. 59, 112 P.2d 1075 (1941). Statute provided that if the debt was not paid after a certain time, it was forfeited, and an action to quiet title could be brought on that ground. See also the discussion at notes 259-63 infra and accompanying text.

100. 109 U.S. 522 (1883).

101. The Court observed as follows:

In this condition of the case they [the stockholders] are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received by way of construction.

Id. at 526.

102. 122 N.J. Eq. 423, 194 Atl. 283 (Ch. 1937).
as the mortgagee paid to satisfy a creditor who had a right of subroga-
tion on a first mortgage.103

Finally, where the defendant was given benefits to the plaintiff in
reliance on void security, as a condition to avoid the effect of the se-
curity interest, the plaintiff must reimburse the defendant for those
benefits. In Dool v. First Nat'l Bank of Calexico,104 the mentally in-
competent decedent executed a deed of trust to the defendant. After
the decedent regained his competency, the defendant continued to
advance money in reliance on the trust deed, which secured future ad-
vances. When the decedent's administrator sought to quiet title to the
property and invalidate the trust deed, reimbursement for the advances
was required. The principle has also been utilized to hold that a mort-
gagee advancing money to the grantee to make improvements in re-
liance on the latter's deed, which was subsequently declared invalid in
a suit by the grantor, was entitled to be reimbursed by the grantor for
the value of the improvements as subrogee.105

However, since the requirement of reimbursement is based on the
need to prevent unjust enrichment, reimbursement is not mandatory
where the improvements have not enhanced the value of the land. The
necessity for such a qualification was demonstrated in Bradecich v.
Rivard,106 where as a result of the encumbrances necessary to finance
the improvements made by the defendant the value of the land actually
decreased, though the improvements taken alone enhanced the value.
At the time of the original transaction the property was worth about
$6000. As a result of the improvements the land was worth $9000, but
encumbrances resulting from improvement loans totaled $4900. The
court ordered the deed set aside due to failure of consideration without
also ordering reimbursement. Moreover, where the defendant has per-
formed services in connection with the transaction, but they involved
no real effort on his part, the plaintiff is not unjustly enriched by not
having to compensate him for those services.107

The right to recover for improvements and other expenditures may
be limited to those made in good faith, that is, that the defendant did

104. 207 Cal. 347, 278 Pac. 233 (1929).
(1946). In an action by an insurance agency to enjoin a former employee from
using the agency's records of information on outstanding policies and from collect-
ing renewal commissions on them, the plaintiff was not required to reimburse the
defendant for his services in the collection of renewal commissions, where he merely
received the checks and indorsed them.
not know or should not have known that his title was being challenged at the time he made the improvements. A number of cases requiring reimbursement emphasized the good faith of the defendant and indicated that such reimbursement would not be required in the absence of good faith; 108 although in some cases where recovery has been permitted, good faith was doubtful, at least insofar as awareness of invalidity was concerned. 109 Some cases have expressly barred the defendant where the court found that the improvements were made in bad faith. Thus, in a suit for cancellation on grounds of undue influence the grantee was not entitled to reimbursement for improvements made after a prior suit had been brought challenging the grantor's power to convey the land, 110 and similarly a constructive trustee has been barred where he made the improvements at a time when he knew of the claim that others were beneficially entitled to the land. 111

Reimbursement for benefits was also denied in Stroud v. Guffey, 112 where the owner of a gas lease sought to enjoin a continuous trespass by the owner of an oil lease who accidently brought in a gas well and then used the gas. It was held that the plaintiff was not required to pay for the well or to offset the cost of production against his claim for damages. The court emphasized that the defendant was a willful trespasser as to the plaintiff, and that there was no pre-existing relationship. The defendant, however, was permitted to remove the casing and equipment. It was immaterial that requiring the defendant to fill the abandoned well constituted economic waste. Since the plaintiff did not make use of the well, he was not required to pay for it; the court stated that had he made use of it, payment would have been required.

There is a serious question as to the propriety of these decisions which refuse relief due to the defendant's bad faith in making the improvements. The fact does remain that the improvements have enhanced the value of the land—otherwise the defendant would not be entitled to reimbursement in any event. Denying relief means that the plaintiff is being unjustly enriched at the expense of the defendant. Since we view the main purpose of civil relief as providing compensation rather than enforcing punishment, the result seems im-

108. Cahill v. Bryan, supra note 95; Jahn v. Purvis, supra note 98; Eckelmann v. Luecking, supra note 95; Blachowski v. Blachowski, supra note 95; Stanko v. Males, supra note 97.

109. See particularly Godzieba v. Godzieba, supra note 96. The son certainly should have been aware that the money was from property held by the entireties. See also Hewett v. McGaster, 272 Ala. 498, 133 So.2d 189 (1961), which involved a finding of bad faith from the inception of the transaction. Suit was brought to cancel a mortgage given on homestead property without the wife's consent. The court held that since the defendant, who occupied the land and made improvements, knew that the property was a homestead and that the wife had not consented, he was aware of the weakness of his title and acted in bad faith.


112. 3 S.W.2d 592 (Tex. Civ. App. 1927).
proper. On the other hand, when a defendant is aware of the weakness of his title, we must ask whether he should be permitted to improve away the plaintiff's interest. As a practical matter, however, it is doubtful that the defendant makes improvements with that intention; a person normally will not make improvements if he thinks he will have to give up the land in hopes of being compensated for them upon surrender. He will not make them either, in the hopes of preventing the plaintiff from recovering the land due to his inability to pay for the improvements, since in such a case the land will be sold, the amount for reimbursement deducted, and the balance paid to the plaintiff. Rather the defendant must believe that he can prevail or the improvements are vitally necessary; otherwise a reasonable person would not make improvements.113 And, the fact is inescapable that when the court does not require reimbursement, the plaintiff is getting a benefit for which he did not pay.

It is submitted that the approach the court took in Stroud v. Guffey,114 should be followed in all cases where the court would ordinarily deny relief because of bad faith. The defendant should have the opportunity to remove the improvements if this is feasible and will not injure the land. If this is impossible, then the plaintiff should be required to pay for the value of the improvements if he makes use of them, assuming he has a choice, e.g., the defendant has built a house on unimproved land. This approach is analogous to the rule that applies where a party has been sent goods he did not order—if he uses them, he is required to pay; otherwise not.115 If it is necessary to draw a distinction between willful and innocent improvers—and some courts apparently do not do so—then this should be the extent. The plaintiff should not be able to make use of improvements without paying for them despite the state of mind of the defendant when he made them. Again, it must be remembered that the court is administering relief and not punishing improper conduct.

3. Payment of taxes in order to avoid tax enforcement

Where the plaintiff seeks to enjoin the enforcement of taxes against him, but admittedly owes some ascertained amount, the general rule is that he must tender the amount due as a condition to relief.116 In this situation an actual tender is necessary before the court will hear

113. We often act, though there is a threat that we will not be able to enjoy the fruits of the action. Much of life involves predictions, and we take the risk of predicting inaccurately; this does not mean that we cease our activities because our prediction may turn out to be false.
114. Supra note 112 and accompanying text.
115. See Restatement, Contracts § 72(2) (1932).
116. See, e.g., City & County of Denver v. Hallett, 45 Colo. 132, 100 Pac. 408 (1909).
the merits of his claim. Tender is also required where the plaintiff seeks to enjoin enforcement of a penalty provision. However, it is not required where the claim is that the assessment itself is void. The difficulty in this area is in determining into which category a particular claim falls.

A number of Supreme Court cases have established the criteria for determining the categories. In *Cummings v. Nat'l Bank*, suit was brought to enjoin collection of taxes on the ground that the taxpayer's property had been taxed unequally with property of the same class. The Court held that the proper mode of relief was to first require the plaintiff to pay the tax that would be equal to the amount assessed on other property of the same class, and upon such payment, which could be made into court, the Court would enjoin the collection of any excess. The same approach was followed by a state court in *Mayor and Aldermen of Savannah v. Fawcett*, where it was contended that realty was taxed discriminatorily in comparison with personalty. The court held that the plaintiff would have to tender the taxes that would be due if realty had been assessed at the lowest tax base applied to personalty.

In *People's Nat'l Bank v. Marye*, suit was brought to enjoin collection of a tax upon shares of stock in the National Bank on the ground that the statute did not provide all the deductions to which shareholders were entitled under the federal statute permitting taxation of the shares. The amount that would be due if all the claimed deductions were given could be ascertained. The Court held that the shareholders would have to pay this amount in order to present their contention. In answer to the argument that the entire assessment was void, which if so, would render any payment unnecessary, the Court observed: "If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no amount equitably due where there never had been a right to assess at all." Here, since the state did have the power to levy the tax under the federal statute, the fact that it erroneously determined the amount due did not render the entire assessment void.

The principal case involving a void assessment is *Norwood v. Baker*, which recognized that where the assessment itself was void, there was no ascertainable amount due, and the court could not decide...
what tax the legislature would want to impose. The technique employed there is to enjoin the illegal tax and permit the legislature to enact a proper one. In that case it was contended that the assessment upon property owners for improvements was unconstitutional, because abutting owners had to bear the entire cost irrespective of the benefits received. The nature of the assessment—which failed to apportion the tax to the benefit—rendered the tax invalid, and the court was unable to do the apportioning, since that was a legislative function.

In this area then the problem is to determine when some amount is clearly due and when the entire assessment is void. In the former situation the court can and will order payment of the ascertained amount; in the latter it can merely enjoin the illegal assessment and give the taxing authority the opportunity to make a proper one. This approach is sound in view of the fact that it prevents a taxpayer from avoiding taxes admittedly due because of the attempt to assess improper additional taxes while leaving actual assessment of taxes to the taxing authority.

4. Rescission and setting aside of transactions

Where a transaction is rescinded or set aside, it is the general rule that unless excused on policy grounds or by other defenses, restoration

124. See Central Ky. Co. v. Comm'n, 290 U.S. 624 (1933) and text accompanying note 22, supra.

125. The Court observed as follows, quoting from HIGH, INJUNCTIONS (3d ed. 1905):

It is held, however, that the general rule requiring payment of tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed.

Norwood v. Baker, supra note 123, at 293.

The same problem was involved in Oklahoma v. Wells, Fargo & Co., 223 U.S. 298 (1912), where the plaintiff sought to enjoin a tax on gross receipts on the ground that it included receipts from interstate commerce unapportioned to the amount of business plaintiff did in the taxing state. The Court did not require tender of the amount that would be due on intrastate receipts, since it was for the state to decide whether the tax was severable.

On this basis tender was not required in Brown County Water Improvement Dist. v. McIntosh, 164 S.W.2d 722 (Tex. Civ. App. 1942), where the claim was that tax assessments were void, since they were made on the unrendered rolls contrary to state law. The court could not assess the property for taxation and in absence of an assessment, no taxes were due. So too, tender is not required in order to enjoin enforcement where the assessor failed to provide the required notice and hearing before making the assessment. City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934). In absence of such notice, there simply was no tax legally due.

126. Setting aside releases will be discussed in the subsequent section, because the underlying considerations differ.

127. Rescission is sometimes used to mean the avoidance of contracts. Setting
of the status quo is a condition to the decree. Such restoration includes return of the consideration,\textsuperscript{128} any out-of-pocket loss,\textsuperscript{129} the rental value of any property that the plaintiff has occupied or used,\textsuperscript{130} any improvements made under the contract,\textsuperscript{131} and compensation for services rendered.\textsuperscript{132} As with reimbursement for improvements, the basis of relief is that otherwise the plaintiff will be unjustly enriched. Therefore, if the plaintiff has received no benefit, he is not required to restore the status quo, even though the defendant may have suffered an out-of-pocket loss. This underlying rationale was illustrated in \textit{Wilks v. McGovern-Place Oil Co.},\textsuperscript{133} where the plaintiff bought land to use as a filling station, relying on the defendant’s misrepresentations, and subsequently found that the land could not be used for this purpose. The court held that plaintiff would not be required to reimburse the defendant for the value of a building which was removed to make way for the filling station. If the loss must be borne by someone and there is no corresponding benefit to the plaintiff, then the wrongdoer is here the proper party to bear it.

Where a party seeks to set aside a judicial sale or similar proceedings due to irregularities or illegality, if he is a party other than the debtor and claims the right to bid, he must offer to pay a higher price and post security,\textsuperscript{134} if he is the debtor, he must reimburse the purchaser for the price paid,\textsuperscript{135} and if the purchaser was also the judgment creditor then the debtor must also reimburse him for the amount of the judgment.\textsuperscript{136}

The problem in this area, other than defenses on policy grounds, is to determine what constitutes adequate restoration of the status quo and what is necessary to prevent unjust enrichment.

\textit{aside} is a generic term and covers all situations where a transaction is cancelled. Cancellation is also a term frequently used to describe the process. It should be noted that the party having the option to cancel can bring an independent action except where a defense to a suit on the contract, if any, would furnish an adequate remedy. \textit{Compare} \textit{American Life Ins. Co. v. Stewart}, \textit{300 U.S. 209} (1937), \textit{with Enelow v. New York Life Ins. Co.}, \textit{295 U.S. 379} (1935). Or he can defend an action on the contract on the grounds that he has a right to rescind, and the court will order a decree of rescission at his behest. Since the rescinding party gets the same relief in either instance, there is no difference as to the conditions the court will impose based on whether he is formal plaintiff or defendant.

\textsuperscript{128} Cooper v. Peevy, \textit{185 Ga. 805}, \textit{166 S.E. 705} (1932).
\textsuperscript{130} Rummer v. Throop, \textit{38 Wash.2d 624}, \textit{231 P.2d 313} (1951).
\textsuperscript{131} Hooks v. Brown, \textit{supra} note 110.
\textsuperscript{133} 189 Wis. 420, 207 N.W. 692 (1926).
\textsuperscript{134} Preskie v. Carroll, \textit{178 Md. 543}, 16 A.2d 291 (1940).
\textsuperscript{135} Farwell v. Harding, \textit{96 Ill. 32} (1880); \textit{Warn v. Tucker}, \textit{236 Iowa 450}, \textit{19 N.W.2d 201} (1945); \textit{Coughlin v. City of Pierre}, \textit{66 S.D. 523}, \textit{286 N.W. 877} (1939); \textit{Hendricks v. City of Sherman}, \textit{220 S.W.2d 189} (Tex. Civ. App. 1949). \textit{But cf.}, \textit{Harrison v. Hass}, \textit{25 Ind. 281} (1865), holding that payment to the purchaser had to be made prior to suit. It is doubtful if the case would be followed today.
Where the plaintiff received the property jointly with another, and the other party received the consideration, the plaintiff may rescind on the ground that the transaction was void as to him without returning the consideration received by the other party. So too, where the party to whose rights the plaintiff has succeeded is alive and can still be made to return the consideration, the courts will not require its restoration as a condition to relief. This was involved in Wigley v. Buzzard, where children of an incompetent grantor sued to set aside her deed to another son and were not required to reimburse him for the amount he paid to clear a pre-existing debt of the mother. There is a division of opinion where the plaintiff is the heir of the party to a transaction, usually the grantor of land. In Jahn v. Purvis, the heirs seeking to set aside a conveyance, were not required to return the consideration to a good faith grantee since they had not received the consideration, and so were not unjustly enriched. A contrary result was reached in Cooper v. Peevy, where the mortgagor's heirs sought to cancel the mortgage on grounds of fraud. They were required to return the amount of the purchase money that was applied to the debt for which the security was given on the theory that they "stood in the shoes of the ancestor."

The latter result is preferable. Since the heirs exercised the option to rescind the voidable transaction, which the ancestor might not have done, the other party should not be deprived of a right which he had against the ancestor. The heirs are being unjustly enriched in the sense that they are getting property they could not get absent such cancellation. Also, since in a majority of states the same persons share realty and personalty equally, the heirs may have actually benefited from the consideration the ancestor received. In any event, the defendant should not be deprived of the return of his consideration due to the fortuity of the decedent's death, which could be the result if rescission is sought after the time for filing claims against the estate had expired. The legitimate interests of all parties are best protected by requiring return by the heirs as a condition to relief.

The question as to what constitutes restoration of the status quo is related to the exact relief the plaintiff will get as a result of the rescis-

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137. Newton v. Erickson, 78 S.D. 228, 41 N.W.2d 545 (1950). The plaintiff, a minor, and his father had made the conveyance jointly, but the father had received all the consideration. Since the father had received all the consideration, the court also held that the defendant would have to look to him for reimbursement for improvements.


139. The court stated that whatever remedy the defendant had would be against the mother, since she received the benefits of the transaction.

140. Supra note 108.

141. But they were required to reimburse the defendant for the value of the improvements. Supra note 108 and accompanying text.

142. Supra note 128.
sion. In Neblett v. Macfarland, the suit was brought to set aside a conveyance on grounds of fraud; the consideration was the cancellation of a bond executed by the plaintiff. As a condition to relief the plaintiff was only required to return the bond and not to pay the underlying debt. The bond was all that the defendant had given up; he had given no cash consideration. The Court would only put the defendant in the same position he was before the transaction, as he now had his security, which was all he had originally. The Court observed that if the value of the security had declined, payment of the debt would have put the defendant in a better position than he was prior to rescission.

This problem was also present in National Life Ins. Co. v. Hanna, where an insurance company sought to cancel a life insurance policy on grounds of fraud. As a condition to relief it was required to return the premiums received, but was not required to reinstate an earlier policy which the insured surrendered in partial payment of the premiums on the new policy. The insured was not required by the agreement to surrender the former policy; he exercised an option to make payments in that manner. The only issue before the court was the validity of the second policy. Also, the plaintiff can avoid return of the consideration by setting off a debt due from the defendant, as in Petrey's Adm'r v. Petrey, where a widow was permitted to cancel a deed of her interest in the realty of her deceased husband's estate without returning the consideration, since she was entitled to receive more than that amount as her share of the estate.

The most difficult situation is where the consideration for the transaction was the rendering of personal services—generally taking care of the plaintiff or another—and some had been performed at the time of rescission. Whether reimbursement for their value is required may depend on why termination of the services occurred and why the transaction was rescinded. This does not refer to the party who was technically in breach. Where the defendant, under the circumstances, could not reasonably continue performance, and the plaintiff seeks rescission, then it has been held that the defendant is entitled to compensation. But where the defendant refuses to perform the services or it is impossible to do so because of his improper conduct, the plaintiff has

143. 92 U.S. 101 (1875).
144. See also Page Belting Co. v. F. H. Prince & Co., 77 N.H. 309, 91 Atl. 961 (1914). There the bonds transferred by the defendant had to be discounted at a loss, since the defendant had not paid for them and because of that the issuing authority became insolvent. The plaintiff was not required to surrender the bonds, but was permitted to retain them for whatever he could get for them—it was as if they were awarded as damages, since the defendant was also insolvent.

We are not concerned here with whether payment should have been required as an additional condition because of positive impairment of security. See Van Scoten v. Albright, 5 N.J. Eq. 467 (Ch. 1845).
145. 122 W.Va. 36, 7 S.E.2d 52 (1940).
146. 262 Ky. 222, 90 S.W.2d 4 (1936).
been permitted to avoid the transaction without paying the value of the services. Of course, where actual money has been spent for the plaintiff's benefit, e.g., doctor bills, the defendant is entitled to reimbursement in any case. The basis of the problem is that where the recipient of the services is still alive, and as is generally the case, the agreement was to take care of the person as long as he lived, the recipient is injured by being denied care and a home for the remainder of his life. The agreement was to take care of the recipient for life and not as long as the grantee wanted to hold the property. It is impossible to set off the value of the services rendered against the loss of future benefits to the recipient because of the rescission.

The latter consideration was present in Zuehlsdorf v. Nelson, where the court ordered rescission without compensation against a grantee who had evicted his mother. The defendant had agreed to support and house the mother for her life in exchange for a loan of money to buy real property. After he evicted her, she sued to rescind the transaction and recover the loan, or in the alternative, to enforce a trust in the property. The relief was granted without the requirement of reimbursement for the reasonable value of the accommodations and care furnished. The court observed: "To charge plaintiff with the reasonable value would in effect change the agreement between the parties from one which assured her a place to live for life into an agreement for only a certain period. There are no circumstances here to make it equitable to modify the agreement." The defendant in this case also enjoyed the benefit of the land as long as he took care of the plaintiff. Even though we may assume that a deduction of rental value would not equal the value of the services, nonetheless, the defendant could have carried out the agreement and received full benefit. Perhaps this is one area where, due to the fact that neither party can be adequately compensated and the status quo cannot be completely restored, the loss should fall on the party committing the actual wrongdoing.

On the other hand, in a case such as Gabbard v. Truett, the awarding of the value of the services as a condition to relief seems most fair. The conveyance was made from one sister to another in exchange for the latter's taking care of their mentally ill brother. The brother was of low intelligence, but could do menial work on the farm. He was physically quite strong and had a violent temper. He had attacked the defendant's young daughter, threatening to rape her and had come at the defendant with an open knife. As a result she had the brother com-

148. 7 Wis.2d 596, 97 N.W.2d 489 (1959).
149. Had this been permitted, the loan would have been substantially repaid.
151. 283 S.W.2d 833 (Ky. 1955).
mitted to a mental institution. The court granted rescission at the suit of the grantor because of failure of consideration, but as a condition to relief required reimbursement for the value of the care furnished. Here, the defendant in good faith tried to take care of the brother, but could not do so without endangering her safety and that of her family.

In *Teats v. Anderson*, a deed of property from the mother and father to the daughter on condition that the daughter take care of them for life was set aside on grounds of undue influence. At the time of suit the mother was alive, but the father was dead. It was held that the mother would not be required to reimburse the daughter for the value of the care she actually rendered. Here, however, the daughter was willing to perform; also, the father was dead, so there was no danger of his not being taken care of for the rest of his life. Moreover, the plaintiff sought to rescind the transaction on grounds unrelated to the care furnished. Unlike the *Zuehlsdorf* case, the defendant was willing to continue caring for her mother. Since the recipient of the services had a choice—either ratify the voidable transaction and receive the services or rescind—when she exercised the latter alternative, she should be required to restore the status quo by reimbursing the defendant for the value of the services. Under the suggested approach there is not the danger of the grantee's furnishing the services for as long as he seeks to hold the land. Since the grantee did not terminate the services, he should be entitled to reimbursement for their value when the grantor terminates. Also, where at the time of suit the recipient is dead, there is no difficulty of computation. If he had received the services until the time of death, there is no loss of future services which can be offset against the defendant's claim. If discontinued prior to death, assuming the value of the services to be relatively constant, there would be a deduction of the amount given for each day they were performed for each day they were not.

It is submitted then that where personal services were the only consideration for the transaction, the following tests should be applied. Where the recipient is dead, irrespective of who terminated the services, reimbursement should be required, since the value of the services can be ascertained and there is no danger of the recipient's losing benefits in the future. If they have been terminated by the defendant in the decedent's lifetime, then it is true that theoretically we are giving the defendant the right to perform the services for as long as he wishes to

152. The care was computed as worth $2 per day; the value of his labor was $1 per day. See also *Alexander v. Andrews*, 135 W.Va. 403, 64 S.E.2d 487 (1951).

153. *Supra* note 147.

154. Actually, he died only five days after the conveyance, so the amount to which the defendant would have been entitled was quite small.

155. If the services were discontinued while the recipient was suffering a serious illness or was otherwise incapacitated, then, of course, the value of the lost services would increase sharply.
retain the property and yet obtain reimbursement upon termination. Conceivably, he might turn the recipient out during his last illness. However, as a practical matter, even absent the assumption that most people simply would not do such a thing, this danger is unrealistic. In the first place, it can be assumed that suit for rescission would be brought by other relatives soon after the eviction. Moreover, if the decedent were seriously ill, the value of the services that should have been performed would be materially increased, so that the deduction would erode the amount the defendant could recover.

Where the recipient exercises his option to rescind, then like any other party, he terminates his opportunity for future gain. And like any other party, upon rescission he should be required to restore the status quo. Since the courts say that the value of personal services can be measured, there is no reason why any different rule should apply merely because personal services are involved. Although the granting of restitution should not ordinarily depend on the good faith of the defendant, here, since neither party can be fully restored to the status quo, as a matter of practical necessity, the loss should fall on the guilty party—guilty, in the sense that his conduct caused termination of the services. When the grantee has no choice but to terminate as in the Gabbard case, he should be compensated, even though the recipient does not get the care for life. But where the grantee refuses to perform, as in Zuehlsdorf, then he should not be entitled to reimbursement, since the recipient has suffered an unmeasurable future loss because of the willful breach. Because of the nature of the transaction the right to reimbursement must depend on which party was at fault in causing termination of the services.

5. Avoidance of a release

The issue here is when a party is required to return the consideration received for a release in order to avoid its effect. Generally, the substantive grounds of avoidance will be fraud, but they may also include mistake, duress or the like. Where fraud is involved, it is necessary to distinguish between fraud in the essence, i.e., the party did not know he was signing a release or thought he was only signing a partial release, and fraud in the inducement, i.e., the plaintiff was induced by false representations to execute the release. In theory, fraud in the essence renders the release void while fraud in the inducement, like duress, mistake and similar grounds, renders it only voidable.

Avoidance of the release may be sought by two methods. It may be avoided in an independent proceeding initiated for that purpose, as any rescission of a transaction. Or, more often, when the defendant pleads the release as a defense to an action on the claim, the plaintiff may move that the defense be stricken. Where return of the considera-
tion is not required, the amount of the release is deducted from the final verdict; if the final verdict is less than the amount given for the release—which is highly unlikely, considering the amounts generally paid for releases that are sought to be set aside—the plaintiff is liable to the defendant for the excess. Since, very often the plaintiff will have spent the consideration for medical bills and the like and has no other means, a requirement of prior return may prevent avoidance of the release.

The best statement of the "rule" as to whether tender is required was made by the court in Carroll v. Fetty, where it was said: "The authorities on the necessity of tender, we find, are in hopeless conflict." We will now proceed to examine this conflict and suggest a solution.

In some instances return of the consideration is never required. Where a statutory cause of action is involved and the statute, either expressly or by implication, provides that return of the consideration is not required in order to avoid a release, then, of course, the court will not require it. The Federal Employers Liability Act has been so interpreted. Another situation is where the plaintiff would be entitled to retain the amount given for the release irrespective of the amount of the verdict. In these cases either the defendant is absolutely liable or liability is not contested. The court generally does not seem to consider the possibility of the defendant's being found not liable on the merits. The following cases indicate the type of situations where the plaintiff is excused from tender on the ground that he is entitled to retain what he received.

Where releases of Workmen's Compensation claims are sought to be set aside, generally the amount paid can be retained, since it usually covers only one item of injury and the plaintiff claims other items. By the same token, where payment for the release was a lump sum, which would be less than the amount plaintiff would be entitled to receive under periodic payments for a specified time, return of the consideration was not required. The clearest case is where the release can be set aside only on the ground that the plaintiff received less than the full amount of compensation to which he was entitled. This theory has also caused the courts to refuse to require tender where the plaintiff suffered personal injuries and damage to his automobile and the release only covered "specials," that is, medical bills and the cost of

157. Id. at 222, 2 S.E.2d at 524.
159. See cases cited supra note 27 and accompanying text.
162. Trokey v. U.S. Cartridge Co., 222 S.W.2d 496 (Mo. App. 1944).
In the cases where the plaintiff was entitled either to retain everything or all but a small amount, the courts have adopted a *de minimis* attitude and have not required tender. Thus, where the beneficiary was paid $595 for the release and was entitled to receive at least $500 on one policy and, if not entitled to receive $1000 on the other policy, was entitled to some amount for the premiums paid, the court permitted suit for the face value of the policies without requiring return of the consideration. And, in *Estes v. Magee*, where the plaintiff received $200 for the release against the defendant, $145 of which was paid back to the defendant, a physician, as his fee for the operation, the plaintiff could sue for malpractice without returning the remainder.

Return of the consideration was not required when the release was given to a co-defendant, or so the plaintiff thought, even though both defendants had the same insurer, who actually paid the money. In *Yellow Cab Co. v. Bradin*, the plaintiff released the owner of the cab in which he was riding from liability for injuries received in a collision with another cab. The insurer stated that the release would not affect the liability of the other cab company, which it also represented. In fact, the instrument did release the other company. The court held that the plaintiff could avoid the release insofar as it affected its rights against the other company without returning the consideration. The court noted that the insurer had charged the amount paid against the former company only. Moreover, when the money was not paid directly to the plaintiff, but instead was paid to the doctors and hospitals or to the funeral director in a death action, return of the consideration has not been required. Here it is recognized that the plaintiff does not have the consideration given and may not have other funds.

Although the language in some cases where the court has required return of the consideration would indicate that failure to return prior to suit constitutes a waiver of any defect in the release, no case has

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165. 62 Idaho 82, 109 P.2d 681 (1940).
166. Plaintiff recovered over $2600 on the final verdict. See also Collins v. Hughes & Riddle, 134 Neb. 380, 278 N.W. 888 (1938), where the court equated a small amount, here $15, with what the plaintiff would be entitled to retain. *Accord*, Hubbard's Adm'x v. Louisville & N.R.R., 267 Ky. 435, 102 S.W.2d 343 (1937). In that case the court found that the release was not for an undisputed portion of the claim. See also *Restatement, Contracts* § 480 (1932).
168. Fraser v. Glass, 311 Ill. App. 336, 35 N.E.2d 953 (1941); Lucas v. Gibson, 341 Pa. 427, 19 A.2d 395 (1941); Scanlon v. Pittsburgh Rys., 319 Pa. 477, 188 Atl. 505 (1935). In the Pennsylvania cases the defendant was unaware of the payments, but apparently he was aware of them in the Illinois case.
170. See Garcia v. California Truck. Co., 183 Cal. 767, 192 Pac. 708 (1920); Frehe
been found where the plaintiff who made a tender at the time of trial was barred; other cases have expressly permitted tender at that time.\footnote{171}{Davis v. Whatley, 175 So. 422 (La. App. 1937); Carroll v. Fetty, \textit{supra} note 156.}

It is doubtful that prior tender is a substantive requirement and that tender cannot be made at time of suit, if required.

Where the case does not come within any of the exceptions previously discussed, that is, the ordinary situation where the plaintiff is seeking to set aside a release either in an independent proceeding or to avoid a defense in an action on the claim, there are at least two and possibly three views as to whether tender is required. In addition there may be a fourth view which is dependent on the time at which plaintiff seeks relief, and it is this view that is advocated here.

Some courts base the requirement on whether the grounds of attack render the release void or voidable; since most cases involve fraud, the distinction can be said to depend on whether there was fraud in the essence or in the inducement. Releases voidable on other grounds such as duress would be treated as equivalent to fraud in the inducement. Where the release is obtained because of fraud in the essence or is otherwise void, restoration of the consideration is not required; where it is obtained by fraud in the inducement or is otherwise voidable, then restoration is required.\footnote{172}{Pacific Greyhound Lines v. Zane, 160 F.2d 731 (9th Cir. 1947), applying California law; Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940); Schoeler v. Roth, 51 F. Supp. 518 (S.D.N.Y. 1942), applying New York law; Farmers Bank & Trust Co. v. Public Serv. Co. of Ind., 13 F. Supp. 548 (W.D.Ky. 1936), applying Kentucky law; Garcia v. California Truck Co., \textit{supra} note 170; Stewart v. Eldred, 349 Mich. 28, 84 N.W.2d 496 (1957); State v. Shain, 339 Mo. 903, 98 S.W.2d 597 (1937); Paul v. Flannery, 128 N.J.L. 486, 26 A.2d 553 (1942); \textit{semble}: Frehe v. Schildwachter, \textit{supra} note 170; Picklesimer v. Baltimore & O.R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949); Carroll v. Fetty, \textit{supra} note 156.}

Fraud in the inducement consists of a material misrepresentation of fact not referring to the writing. Thus, a misrepresentation by the defendant employer's physician as to the nature and extent of the employee's injuries constituted fraud in the inducement and restoration of the consideration was required.\footnote{173}{Picklesimer v. Baltimore & O.R.R., \textit{supra} note 172.} Fraud in the essence usually refers to the release itself, in that it had a different effect than the plaintiff was led to believe. In this area the courts are very solicitous of the plaintiff and apparently do not hold that he is under a duty to read the release before signing it. This represents a practical understanding of the situation. Ordinarily a party seeking to set aside a release was not represented by counsel when he signed it; had he been, it is doubtful whether he would be suing to rescind because dissatisfied with the amount, which is, of course, the real reason he wants to rescind. Often
insurance adjustors will attempt a “quickie” settlement soon after the accident or death. It takes no great feat of one’s imagination to picture the adjustor assuring the plaintiff in his hospital bed that “this paper is just a matter of form so we can pay your doctor’s bills,” when in fact it is a full release from all liability. In this regard the courts have understood the factual content of the transaction.174

Examples of situations rendering the release void include the following: a release represented to an alien stevedore, who could not read English, as a receipt for payment of doctor’s bills;175 an insurer represented that it was settling for the total amount of policy, and that it would release only the company and not the individual defendant, both of which statements were untrue, and refused to read it to plaintiff, who could not read it because he did not have his glasses;176 a release contained different provisions than plaintiff was told it contained;177 and a release which purportedly covered only medical bills to date, repair of automobile and other “specials,” but was actually a full release.178 It has also been held that a release executed by an incompetent was void and return of consideration was not required.179

In a number of cases the courts have stated that return of consideration is required whenever a release is sought to be avoided, and they have not drawn the void-voidable distinction.180 In none of these cases was the void-voidable distinction discussed, but one court stated that return of consideration is always required,181 and another required return of the consideration where the claim was fraud in the essence, i.e., plaintiff, who could neither read nor write was told the release was a receipt.182 However, in the other cases voidable releases have been void and return of consideration was not required.179

174. See Stewart v. Eldred, supra note 172. Soon after the death of the plaintiff’s child the adjuster visited the plaintiff, a man of little education, and represented that the paper was a receipt for funeral expenses, which the company said it would pay. Actually, it was a release for wrongful death liability.

175. Panama Agencies Co. v. Franco, supra note 172.


177. Jordon v. Guerra, 23 Cal.2d 469, 144 P.2d 349 (1944). The court noted that the rule was not limited to the cases where the releasee could not understand English or there was a confidential relationship.


179. Farmers Bank & Trust Co. v. Public Serv. Co. of Ind., supra note 172.


181. McGregor v. Mills, supra note 180. The language of the court did not indicate that this requirement was ever excused. However, there is no doubt that it would recognize the “entitled to retain” and similar exceptions, since there the plaintiff actually owes nothing.

182. Davis v. Whatley, supra note 171.
involved and these courts may accept the void-voidable distinction in a proper case.

In still another number of cases the courts have held that the consideration did not have to be returned and did not expressly distinguish between whether an independent action was involved or whether the release was asserted as a defense and the plaintiff sought to avoid it at that time. These courts base their decision on the grounds that, as a practical matter, the plaintiff may have spent the money and the amount of the release can be deducted from the verdict. There is the implicit assumption that the amount of the verdict will exceed the amount of the release, which, as previously indicated, is almost universally true.

It is submitted that the approach of these courts is more sound. The plaintiff, particularly in personal injuries actions, will have used, or will use, a good portion of the money to pay for medical expenses and others resulting from the injury and for living expenses until the trial, which may involve a quite lengthy period. Furthermore, the improper conduct in obtaining releases in all too many instances is well known. Moreover, where the release is sought to be avoided in the trial of the underlying claim after the defendant has asserted it as a defense, which is the more likely situation, the defendant is adequately protected. The amount of the release can be deducted from the verdict. In the unlikely case that the verdict is less, he will have to pay nothing and would be entitled to a judgment against the plaintiff for the difference. The instances where the defendant will be saddled with an "uncollectible" judgment for the excess are far outweighed by those cases where the requirement of tender will prevent the plaintiff's avoiding a fraudulent release and recovering adequate damages. Further, the court is spared the absurd situation of the plaintiff—if he has the consideration—returning it at the time of trial only to be entitled to get it back again and more a few days later when the jury renders a verdict. If the defendant prevails on the question of the validity of the release, then he must return the consideration that was returned to him shortly before. The requirement of return of consideration has the primary effect of preventing defrauded plaintiffs who have spent the consideration from receiving adequate relief.


185. What probably happens is that the releasorconsults a lawyer after signing it. We can assume that the lawyer would not advise him to try to set it aside (on a contingent fee basis) unless substantially more could be recovered.
However, it is submitted that where the plaintiff brings an independent action to cancel the release and does not join his claim on the merits, then return of the consideration should be required unless the case falls within one of the exceptions previously discussed. Here too, the result should not depend on whether the release is void or voidable. To the extent that the plaintiff has a decree voiding the releases and retains the consideration, he is being unjustly enriched. It is true that the plaintiff may be bringing the action to improve his settlement position; however, if the parties are engaged in settlement negotiations, then the trial of the substantive claim can be delayed. The defendant should not be burdened with a contingent liability until the possible running of the statute of limitations, while the plaintiff retains the benefits received from the release or has expended them.

A true rescission would mean that the plaintiff has his claim and the defendant the consideration he paid for the release. In summary, it is submitted that return of the consideration should not be required where the defendant asserts the release as a defense to a suit on the claim or the plaintiff sues to rescind and joins the underlying claim, but should be returned where the plaintiff institutes an independent action without such joinder. Such an approach would also eliminate void-voidable distinctions and fully protect the legitimate interests of both parties.

The difference in result between an independent suit to cancel and the action on the claim was recognized in *Texas Employers Ins. Ass'n v. Kennedy*. In that case an employee sued to cancel a compromise settlement for a compensation claim between him and the insurer. The court ordered cancellation; it could not award a verdict on the original claim, since proceedings would have to be instituted before an administrative agency. However, it expressly drew the distinction between a common law action for damages and cancellation of the release (which would include the situation where the defendant raised the release as a matter of defense) and an affirmative action to cancel, saying that return of the consideration was not required in the former instance, but was required in the latter. Here, since the court believed it likely that the agency would award an amount in excess of the consideration, and suit had to be brought within a specified time, it found the case was more akin to a common law action on the claim than an independent proceeding to set aside the release.

It is submitted that such an approach fully protects the interests of both parties and protects an improvident or impecunious plaintiff from the effect of an invalid release. At the same time it protects the defend-
6. Payment of mortgage or debt to obtain relief from foreclosure of sale

It is the general rule that when a party seeks to prevent a foreclosure or sale to satisfy indebtedness, he must, as a condition to relief, tender any amount admittedly due at the time of suit. This is so whether the plaintiff is moving directly against the sale on grounds of irregularity or is bringing an action to remove the improper sale as a cloud on title. This principle was applied to require payment of the debt in *Otis v. Gregory*, where a valid mortgage was cancelled and a void mortgage given in its place. The plaintiff, a married woman, executed a mortgage in a state where she had capacity to do so. The defendant released the mortgage to enable the plaintiff to purchase land in the forum, where she gave a new mortgage as security for the purchase price. She lacked such capacity in the forum. The court held that both mortgages involved a single transaction and that in order to avoid the second mortgage, which was void, she had to pay the debt secured by the first mortgage. Under the same reasoning, in *Jennings v. Arnold*, where the mortgagee had paid past-due taxes and exhausted her resources in doing so, the mortgagor who sought relief under the moratorium statute was required as a condition to relief to pay such taxes as might be necessary in order to avoid the danger of the mortgagee’s loss of security through tax liens, and also was ordered to make monthly payments of past-due indebtedness.

However, payment is not required where the mortgagee foreclosed prior to the time the debt was due, since it would give the mortgagee payment at a time when he was not entitled to it under the contract. Where part of the amount is due at the time of suit, the plaintiff is required to pay that amount and relief is conditioned upon making

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188. Logically, and pragmatically, the grounds of invalidity have no relationship to a reason for requiring return of the consideration.
191. 111 Ind. 504, 13 N.E. 39 (1887).
future payments as they fall due.\textsuperscript{194} Payment of the debt as a condition to relief against foreclosure was not required where the mortgagee had not received cash for the security he gave, but instead had discharged other liens against the land.\textsuperscript{195} That decision recognizes that since the mortgagor did not receive consideration that can be returned, the court must balance the injury to the defendant arising from the plaintiff's inability to reimburse him for the benefits received against the injury to the plaintiff from permitting foreclosure of an invalid security interest due to that inability. Under the circumstances the balance was weighted in favor of the mortgagor.

Moreover, some cases have not required payment of the debt in order to vacate a void judgment where the security of the creditor was not affected by the decree. In \textit{Van Meter v. Field},\textsuperscript{196} the mortgage foreclosure as to homestead property was void, since only one spouse had been joined. In a proceeding by both to vacate the judgment the plaintiffs were not required to pay the amount of the mortgage as a condition to relief. Since the defendant did not lose his security, as he could foreclose the mortgage by a proper proceeding, there was no need for conditional relief. This principle worked to the advantage of the defendant in another case where the conditional vendee sued to obtain relief against improper repossession of a chattel.\textsuperscript{197} It was provided that upon improper repossession the plaintiff was relieved of all obligations to pay the balance and was entitled to recover payments already made. The court gave the declaratory relief and ordered return of payments, but refused to order return of the chattel. The repossession voided the transaction and relieved the plaintiff of all liability. Since the repossession proceedings could be separated from the chattel itself, there was no need to order return of the chattel, as plaintiff received all the benefits to which he was entitled by being relieved of the obligation.\textsuperscript{198}

The question arises as to the extent to which the principle of the \textit{Van Meter} case, that payment is not required where the mortgagee's security is not affected by the court's action, is applicable. Cases where the defect was that realty was not levied on after personalty as required by statute,\textsuperscript{199} or where there was an improper advertisement and insufficient bids,\textsuperscript{200} have required payment of the debt, even though the

\begin{itemize}
  \item \textsuperscript{194} Auld v. Cobb Exch. Bank, \textit{supra} note 190. Plaintiff had to make monthly payments until maturity of the note as long as the decree remained in effect.
  \item \textsuperscript{195} Rotge v. Dunlap, 91 S.W.2d 905 (Tex. Civ. App. 1936).
  \item \textsuperscript{196} Okla. 565, 159 P.2d 546 (1945).
  \item \textsuperscript{197} Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944).
  \item \textsuperscript{198} The test was whether the property ever belonged to the plaintiff. The court admitted that a contrary result might occur if the plaintiff had given a chattel mortgage. A distinction based on the nature of the security, however, is unsound. See \textsc{Uniform Commercial Code} § 9-102. The test should be whether the intent of the legislature was to relieve the plaintiff from the obligation, and if this is so, this is all the court should do. He is not entitled to the property in either instance.
  \item \textsuperscript{199} Blasingame v. Wallace, 32 Ariz. 580, 261 Pac. 42 (1927).
  \item \textsuperscript{200} Leonard v. Bank of America, \textit{supra} note 189.
\end{itemize}
mortgagee's security would not be affected by the decree. It is suggested that in cases such as these the court weighs the injury to the policy sought to be effected by the statute against the inconvenience and possible lower price that would result from another sale. Where the statutory policy is particularly strong—courts are very scrupulous about actions affecting encumbered homestead—\textsuperscript{201} the court is less likely to require payment; this represents an \textit{in terrorem} approach to insure compliance in the future. It is suggested that throughout this area the conditioning of relief in the manner done by the courts is quite appropriate.

7. \textit{Additional requirements unrelated to performance of obligation}

It is here that the court's power to grant conditional relief can be used most efficaciously to protect the real interests of all the parties. The power to grant relief in the situations to be discussed stems directly from the "appeal to the conscience of the chancellor" attitude of the former courts of chancery. Because of the basic flexibility of specific and declaratory relief, moreover, it is possible to condition that relief to a much greater degree than where damages are involved, since in the latter situation often the only issue is whether the damages should be reduced. Here, particularly, is the recognition of the fact that often neither party is entirely "in the right." Further, the court's power to condition relief may be in the plaintiff's interest, since otherwise the court might refuse any relief on grounds of hardship, unfairness or the like.

One instance of such relief has been to require the plaintiff to give the defendant the opportunity to secure the intended benefits of a transaction or minimize his loss.\textsuperscript{202} In \textit{Brooks v. Towson Realty Inc.},\textsuperscript{203} the vendor executed two documents by which he agreed to sell the land in two parcels at a price of $75,000 for parcel A and $3000 for parcel B. Prior to the contract the vendor told the vendee that he wanted to sell the land as a unit and would only enter into negotiations on that basis. The vendee said it would take the land, but wanted a division into two tracts primarily for tax and subdividing purposes. The vendee sued only to specifically enforce the contract for parcel B. If the plaintiff would get specific performance for parcel B only, he would get the land for about $.06 per square foot; if the land were computed on the price of $78,000 for both lots, the price would be about $.44 per square foot. Although the vendor did not seek specific performance of the contract by which the vendee agreed to take parcel A, the court held it would

\textsuperscript{201} See the discussion at note 103 \textit{supra}, and accompanying text.

\textsuperscript{202} This is analogous to the doctrine of avoidable consequences in the damages field. Where the plaintiff has not acted reasonably to minimize the loss, he cannot recover the additional damages. See, \textit{e.g.}, \textit{Restatement}, \textit{Torts} § 918 (1939).

\textsuperscript{203} 223 Md. 61, 162 A.2d 431 (1960).
grant specific performance for parcel \( B \) only, conditional on the vendee's also taking parcel \( A \) at the stated price. It indicated that otherwise it would refuse specific performance on the ground of hardship and mistake.

In *Austin v. Federal Land Bank*,\(^\text{204}\) the mortgagee sued to set aside a sale of the mortgaged land and to foreclose his mortgage. The purchaser had built a cottage on the unimproved land without actual knowledge of the mortgage, although, since it had been recorded, he was bound by constructive notice and could not be a bona fide purchaser for value. The sale was set aside and foreclosure ordered conditional on the mortgagee's giving the purchaser a reasonable time, here six months, to remove the cottage, as this was technically feasible. The result placed the parties in status quo and prevented unjust enrichment of the mortgagee. It has also been held that where an adjoining landowner is required to remove a portion of an encroaching structure, and the removal can be made more efficaciously working on the plaintiff's land, the plaintiff would be required to permit the defendant to enter upon his land, conditional upon payment of a reasonable charge to the plaintiff.\(^\text{205}\)

The court will use this power to prevent future litigation *sua sponte*. In *Corby v. Bean*,\(^\text{206}\) where the plaintiff sought reformation of a security given for a usurious debt, the plaintiff was required, as a condition to relief, to rebate the usurious payment and permit the instrument to be further reformed to eliminate the usurious provisions. Also, by granting conditional relief, the court has compelled the plaintiff to eliminate the conduct prompting the defendant to act wrongfully. In *Board v. Schneider*,\(^\text{207}\) the owner of the upper riparian estate erected a structure which to some extent increased the flow of water on the lower estate, but which was not such an unreasonable use that the lower riparian owner would have been entitled to enjoin it. To prevent this flow he constructed a dam that threw back the water on the upper estate; this conduct was enjoinable. The court granted the injunction at the suit of the upper riparian owner, but it was conditioned upon his restoring the land to its natural condition as reasonably as could be done.

In *Erickson v. Erickson*,\(^\text{208}\) the court used this power to require performance of a moral obligation in the technical sense, *i.e.*, one which could have been legally enforced at the proper time, but which was

\(^{204}\) 188 Ark. 971, 68 S.W.2d 468 (1934).
\(^{205}\) McNamary v. Firestone Tire & Rubber Co., 114 Pa. Super. 282, 173 Atl. 491 (1934). The charge was $7.50 for each working day.
\(^{206}\) 44 Mo. 379 (1869).
\(^{207}\) 301 Ky. 289, 191 S.W.2d 418 (1945).
\(^{208}\) 30 Wash.2d 914, 194 P.2d 954 (1948).
now affirmatively unenforceable. The divorced husband obtained modification of a support decree to relieve him from making further payments for their daughter who had finished secondary school and had gone to work. The decree was subject to reopening and reinstatement of the support order if the daughter later decided to go to college. She did so, but the wife had never moved for restoration of the decree and paid the full expenses. The husband subsequently sued to compel the wife to return stock held by her as security for support payments, to which return he was entitled. The relief was conditioned on his paying half of the expenses of the daughter’s college education. In answer to the plaintiff’s argument that the court could not impose the condition, since there was no implied agreement to pay for this under the modified decree, the court observed: “We therefore do not predicate our decision on any implied agreement . . . but on the proposition that, before a court of equity will grant him the relief he desires, he will be required to perform the natural duties of a father which should be performed without compulsion and without quibbling about whether there was or was not an implied agreement so to do.”

The courts have imposed conditions which directly conflicted with the obligations that plaintiff had assumed. However, the alternative would have been to refuse any relief because of hardship or the like. The court will not specifically enforce a contract where the performance of the plaintiff’s obligation is not secured to the court’s satisfaction; this is the present status of the “mutuality rule,” which only requires that at time of suit the defendant be assured of receiving the agreed exchange. Thus, where the plaintiff seeks specific performance of a contract to transfer property and payment is to be made in the future, the court will only grant relief conditional upon the plaintiff’s paying cash or giving security, though he did not agree to do so in the contract.

Another example, and limited to almost the precise situation, occurred in Willard v. Tayloe. There the parties had entered into a ten-year lease with an option to purchase at termination. As a result of the Civil War the government issued “greenbacks,” which were legal tender. Payment of debts in specie and the use of specie as currency were permitted, however, unlike the situation prevailing under the

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209. Note the similarity to the cases where the obligation was unenforceable due to the statute of limitations, notes 253–58 infra and accompanying text.

210. Erickson v. Erickson, supra note 208, at 916, 194 P.2d at 957.

211. See Restatement, Contracts § 220 (1932).


213. Beardslee v. Grindley, 236 Mich. 453, 210 N.W. 486 (1926); Van Scoten v. Albright, 5 N.J. Eq. 467 (Ch. 1846). This condition also has been imposed against a state agency. See also State Highway Comm’n v. Golden, 112 N.J. Eq. 156, 163 Atl. 551 (Ch. 1933).

214. 75 U.S. (8 Wall.) 557 (1869).
Gold Clause abrogation. The contract said nothing about payment in specie. The vendee tried to make payment in "greenbacks," which the vendor refused. In the vendee's action for specific performance the court granted relief conditioned on payment in specie despite the vendor's claim that all relief should be refused because of hardship. This case established the principle that relief would not be refused on grounds of hardship where the plaintiff could eliminate that hardship. The holding is limited to an extreme depreciation such as the one involved at that time, and there is the further requirement that payment in specie be legally possible. It is not recommended that counsel for the defendant attempt to make specific performance conditional upon payment of the contract price at present purchasing power. The law, too, must live with the inflationary spiral.

The applications of conditional relief in this area are varied; in all cases the application has effectuated a just result. Thus, in Kanauske v. Clark, where a residuary legatee sued to set aside a deed of the testator due to the grantee's fraud and the grantee sought a decree upholding the validity of her title, the court ruled in favor of the grantee, but as a condition to relief, required her to protect the interests of the residuary legatee. The legatee had executed a deed of other property to the grantee so that she would receive some compensation for the services she had rendered the decedent; however, she later filed a claim against the estate for those services. As a condition to the decree, she was required to withdraw her claim against the estate. So too, in Brown v. Bartlett, a wife seeking to cancel the deceased husband's change of beneficiary to the defendant on grounds of incompetency, was required to restore the consideration paid by the defendant. In Ross v. Rambo, an innocent purchaser from the defaulting trustee, who had paid only a portion of the consideration prior to notice and thus could not be a bona fide purchaser for value, was entitled to reimbursement for this amount in a suit to have a resulting trust declared in the land. Finally, in Lacy v. United States, where the government had constructed a transmission line across the defendant's land, which constituted a public taking, but for which he had not been compensated, as a condition to the government's enjoining his interference with the line, it was required to pay the value of the condemned property or institute condemnation proceedings. The court rejected the government's argument that since this was a taking, the defendant should have instituted proceedings for compensation.

216. 388 Ill. 357, 57 N.E.2d 890 (1944).
217. Otherwise the decree would have been for the plaintiff.
220. 153 Ga. 100, 13 S.E.2d 687 (1941).
221. 216 F.2d 223 (5th Cir. 1954).
There are doubtless many more examples, which research has not disclosed. In this area the court's power is used to achieve a truly just result. It is certainly not unfair to the plaintiff to require such conditions, where it is remembered that often the alternative would be to remit him to damages because of hardship or the like, though admittedly, damages would be inadequate. Both as a result of its historical development and its very nature, equitable relief is flexible and far more discretionary than damages. Thus, the court can condition relief to protect the legitimate interests of both parties. Conditional relief represents the emergence of law into what Dean Pound has called "the stage of maturity," since it enforces rights, insuring some predictability, while at the same time effecting substantive fairness. In this stage the standard and principle replace the absolute rule; fair conditions—the plaintiff shall not be unjustly enriched, for example—are imposed despite the plaintiff's showing of a "right" to relief. The final result is one calculated to produce substantial justice between the parties.

C. Defenses to Conditional Relief

As with affirmative relief, even when conditional relief is ordinarily appropriate, there may be considerations justifying the refusal to grant such relief in a particular case. Therefore, we must concern ourselves with defenses to conditional relief, a defense to a defense so to speak. There may be conflicting policies justifying the refusal of conditional relief in certain instances. This power should not be used to destroy societal and public interests, simply because such relief appears affirmatively proper. In the following section we will consider applications of this principle and inquire into their soundness. We will further suggest improvements that should be made and attempt to resolve conflicting approaches. At the outset, it should be noted that many problems arise, because some courts still base distinctions on whether the nature of the claim is legal or equitable.

1. Actions to recover governmental property

Where suits to recover governmental lands are brought, two issues relating to conditional relief arise: (1) whether the defendant is entitled to return of any consideration paid; (2) whether he is entitled to be reimbursed for the value of improvements and other benefits accruing to the government. As to return of the consideration, where the government sues to rescind the sale of public lands on grounds of fraud or other illegality in the transaction, the sale will be set aside without requiring the return. The Court has emphasized that the govern-

ment is not in the position of an ordinary seller, and that the public interest in the restoration of the land to the public domain outweighs the injustice of the defendant's being deprived of the consideration. Moreover, these cases were decided at a time when payments went directly into the treasury, and the agency that sold the land would not have a separate suspense account from which payments could be made without congressional authorization. Therefore, the practical result of requiring repayment would be to deny the government relief. Also, it was assumed that Congress would appropriate the money after the land was returned to the government. The solvency of the government is not in question. The attitude of the court is best demonstrated by the following language in Causey v. United States: 224

But, as this court has said, the Government in disposing of the public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization and when action is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title and abide the judgment of Congress as to whether the consideration paid should be refunded.

Applying this principle, a very reluctant Court of Appeals held in Ehrlich v. United States, 225 that a deed from the Public Housing Administrator to ineligible parties and from them to the vendee, could be rescinded due to fraudulent representations without requiring return of the purchase price as a condition to relief. All three judges favored requiring restitution, but the majority believed that this was prohibited by the Supreme Court decisions previously discussed. Judge Wisdom contended that here the suit was not to vindicate national policy with respect to the public lands, but that the government was in the position of a private person selling real estate at market value. He also noted that the policy of the statute was effectuated by criminal prosecution and that one of the defendants had been convicted. Judge Tuttle and Chief Judge Hutcheson concluded that the case was not distinguishable in principle from the others and held that the government could not be required to return the consideration. Under this approach it has been held that in a suit by taxpayers to cancel a deed given by

224. Supra note 223, at 402.
225. 252 F.2d 772 (5th Cir. 1958).
a school district on the ground that the sale was not approved in a referendum as required by statute, the school district was not required to return the consideration as a condition to relief.\textsuperscript{226}

This principle has also been applied where the government has sued to rescind deeds to land given by Indian allottees, because the statute providing such allotments made their land inalienable. In such cases the government has not been required to return the consideration paid to the allottee as a condition to relief.\textsuperscript{227} As the Court observed in \textit{Heckman v. United States}: \textsuperscript{228} "A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation, a pauperized, discontented and possibly belligerent race." The same reasoning has been followed when the Indians themselves were the plaintiffs, and restoration of the consideration has not been required.\textsuperscript{229} However, in \textit{Taylor v. Grant},\textsuperscript{230} where the sale had been previously set aside by the United States and the consideration was in the hands of a conservator bank, the vendee was permitted to recover it in an independent action.\textsuperscript{231} In one case, where a government official was a party to the fraud and apparently the defendant was innocent, the United States was required to return the consideration.\textsuperscript{232}

As to recovery for improvements, the result depends upon the good faith of the improver. As a practical matter, since the government is entitled to the rental value and any profits, the issue is whether the defendant can offset the value of the improvements against the government's claim for the accounting, and whether he can remove the improvements if this is feasible. The same considerations that justify the failure to require return of the consideration would prevent imposition of a duty to pay money against the government if a balance were found due the improver. Based on this distinction, where the improver has acted in good faith, such as removing timber pursuant to a contract with the entryman in ignorance of the defect in the latter's title,\textsuperscript{233} or entering onto the land under mistake of law with advice of coun-

\textsuperscript{226} Toler v. Love, 170 Miss. 252, 154 So. 711 (1934).

\textsuperscript{227} Heckman v. United States, 224 U.S. 413 (1912); Siniscal v. United States, 208 F.2d 406 (9th Cir. 1953), cert. denied, 348 U.S. 818 (1954).

\textsuperscript{228} Supra note 227, at 438.

\textsuperscript{229} Oates v. Freeman, 57 Okla. 449, 157 Pac. 74 (1915); Colombe v. Wilson, 29 S.D. 49, 135 N.W. 668 (1912). In the \textit{Oates} case the result was considered required under federal law; in the \textit{Wilson} case the transaction was treated as analytically void.

\textsuperscript{230} 204 Ore. 19, 279 P.2d 470 (1955).

\textsuperscript{231} The federal court had refused to order return of the consideration, because the court could not impose a lien on the land and the conservator bank was not a party. Siniscal v. United States, supra note 227.

\textsuperscript{232} United States v. Debell, 227 Fed. 775 (8th Cir. 1915).

\textsuperscript{233} United States v. Detroit Lumber Co., 200 U.S. 321 (1906).
sel, or otherwise being an innocent trespasser, he has been entitled to offset the cost of improvements and production or to remove his equipment. But where the property was obtained through improper collusion with a government official, or by fraudulent representations, the defendants have been held to forfeit the value of the improvements and could not remove them even where feasible.

Where the improver has acted in good faith, the Court speaks of its power to grant conditional relief against anyone, including the government, in order to prevent unjust enrichment. As it observed in the Detroit Lumber case:

The principles of equity exist independently of and anterior to all congressional legislation and the statutes are either annunciations of these principles or limitations upon their application. The Government has every dollar which it would have received in case of a perfectly valid entry and has also recovered the land. Surely it is not just for it to ask further payment, and from a party who dealt in good faith with the entryman, relying upon the titles which it had created.

On the other hand, in the case of fraudulent conduct, its sole concern is with the vindication of public policy. In Pan-American Co., after noting that the government did not stand in the position of a "mere seller or lessor of land," it went on to state:

This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. The petitioners stand as wrongdoers, and no equity arises in their favor to prevent the granting of the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made or fuel oil furnished as all were done without authority.

The Court also observed that, "since Congress had not authorized them, it must be assumed that the United States did not want the im-

236. See also Jacobs v. United States, 239 F.2d 459 (4th Cir. 1956), cert. denied, 353 U.S. 904 (1957). In a suit by the United States against a contractor who had terminated the contract in accordance with its terms to require him to turn over the records and drawings, as a condition to relief, the United States had to satisfy counterclaims arising from the contract. The court admitted that it could not use the principle to entertain counterclaims that Congress did not authorize. But this claim was not prohibited by Congress, and the court drew the analogy to requiring payment in a suit for specific performance.
238. United States v. Howard, supra note 223.
240. Pan-American Co. v. United States, supra note 237, at 509-10.
provements made or was not ready to bear the cost of making them." 241

It is submitted that these approaches overlook the practical realities of the situation and evidence a concern with punitive rather than compensatory results. Thus, a "bad faith" trespasser cannot offset the costs of improvements while a "good faith" one can. Ordinarily Indian allottees and the government are protected, but when the government acted "badly" it was punished, although the practical result may have been to cause the Indian to lose the land. The decree provided that if the consideration was not returned by the government, the land would be sold; the consideration paid to the vendee and the balance if any, used for the benefit of the Indian. Assuming, as the other cases indicate, that the government could not reimburse the vendee absent a congressional appropriation and that the Indian did not have the consideration, the Indian would lose his land: the very result that the court in the other cases sought to prevent. By punishing the government, the court defeated the very purpose of the suit.

The answer must be to formulate an approach by which both the public interest and the rights of the defendant will be protected; the government must be able to regain public property on its behalf or that of its wards, but at the same time should not be unjustly enriched. The quality of the conduct of the government or the defendant should be irrelevant. As to return of the consideration, it is not disputed that the government or the allottee must be able to regain the property and cannot be barred by failure to return the consideration if they are unable to do so. This is the basis of the distinction. Where the government sues to regain property and it cannot return the consideration, then, the present approach is sound. What is unsound, however, is to assume that the government cannot do so. It must also be remembered that recovery of the consideration against the government in an independent action is at best problematical. 242 Even if recovery is possible, it is inefficient to require a second suit when all rights and liabilities can be determined in one action. In the first place, where a government corporation such as TVA is involved, there is no reason not to require a return of the consideration. 243 The corporation has a separate account and can disburse money without the necessity of a treasury appropriation. Moreover, where surplus property is involved, the agency may deposit in a special account in the treasury such amounts

241. *Id.* at 510.

242. The Court has stated that restitutionary recovery against the United States is limited to contracts "implied in fact" and not those "implied in law." *United States v. Minnesota Inv. Co.*, 271 U.S. 212, 217 (1926). Although the court has strained the interpretation of "implied in fact" contracts, see e.g., *Portsmouth Co. v. United States*, 260 U.S. 327 (1922), and *United States v. Buffalo Pitts Co.*, 234 U.S. 228 (1914), it is doubtful whether one would be found in the case of a willful trespasser.

243. Research has disclosed no cases involving government corporations.
as it deems necessary to permit refunds upon rescission.\textsuperscript{244} Other federal agencies may have similar authorizations. All that is suggested is that where there is a separate fund, and return of the consideration can be made without the need for congressional appropriation, such return should be required as a condition of relief. The reason for the rule clearly has ceased in such a case.

As to the Indian allottee or other wards, the same principle should apply as in the case of minors. If the allottee has the consideration, then its return should be required as a condition to relief whether he or the government is the plaintiff. In \textit{Taylor v. Grant},\textsuperscript{245} the court observed that in the federal court action in which suit to recover the land was brought, the conservator was not a party and it was for that reason that the court did not issue an order. It also observed that in the \textit{Heckman} case\textsuperscript{246} the Supreme Court authorized return of the consideration as long as it did not contravene governmental policy, which is accurate. In that case the Court indicated that had an exchange of lands been involved, it would have required return of the land received by the allottee.\textsuperscript{247} The court could also consider the general resources of the allottee and determine whether return of the consideration would be so burdensome as to render the allottee dependent upon the United States.\textsuperscript{248} So long as the allottee obtains the land and return of the consideration is feasible, there is no reason why the court should not require this as a condition to relief. Also, the approach in the \textit{Debell} case\textsuperscript{249} is equally undesirable, since due to the government's misconduct, the allottee may lose the land. The practicability of conditional relief and not the conduct of the government should be the criterion.

With respect to recovery for the improvements, a result dependent upon the good faith of the improver in making the entry is highly improper. The government should not be unjustly enriched even at the expense of a wrongdoer, since again, the purpose of administering civil relief is not to punish. On the other hand, the government should not be burdened with improvements it does not want. In the \textit{Pan-American} case the Court observed that "it must be assumed that the United States did not want the improvements made or was not ready to bear the cost of making them."\textsuperscript{250} Then, the United States should have no objection to permitting the defendant to remove the improve-

\textsuperscript{245} 204 Ore. 10, 279 P.2d 479 (1955).
\textsuperscript{246} Heckman v. United States, supra note 227.
\textsuperscript{247} Ibid.
\textsuperscript{248} Consider for example an Indian who has become wealthy as a result of oil being discovered on his land. He could then alienate other land and recover it without returning the consideration, adding to his wealth.
\textsuperscript{249} United States v. Debell, supra note 232.
\textsuperscript{250} Pan-American Co. v. United States, supra note 237, at 510.
ments if this is feasible, as is permitted in the case of a good faith trespass. Moreover, if the government does not want the improvements, then it may be asked why the government has not required the defendant to remove them, which relief can be ordered against a trespasser. The same principles that it was suggested be applicable in the case of a bad faith improvement to private property are equally applicable here—indeed, they may be more cogent, since the bad faith is from the inception of the transaction rather than from the time of knowledge of conflicting claims. If the government is making use of the improvements or if they enhance the resale value of the land, then the defendant should be permitted to set off their value. If an excess is due, of course, he cannot recover unless there is a separate account from which payment can be made. If the government does not want the improvements, then clearly it can have no objection to the defendant's removing them and should even require him to do so. When it does not permit or seek removal, then this would seem to be conclusive proof that the government wishes to make use of them. Since it does, then it is unjustly enriched unless the defendant is at least permitted to set off their value. In summary, it can be said that so long as there is no interference with the governmental interest—the government must be able to recover public property wrongfully possessed and cannot be charged with improvements not benefitting the public—and it is feasible to impose conditional relief in the particular case, the court should follow the approach it does when the good faith trespasser seeks recovery for improvements and grant conditional relief. The good state of mind of the defendant is as equally irrelevant where the government is involved as in a suit by a private person.

2. The statute of limitations and presumption of payment

The relationship of the lapse of time to the power of the court to grant conditional relief must be considered in light of the concept of a right without a remedy, which exists in our law. Without considering the soundness of such an approach, it is simply noted that the court in administering conditional relief must have regard for it. A true statute of limitations—one which merely prevents enforceability of the obligation—is only relevant to defensive relief. It seeks to prevent suits due to lapse of time for policy reasons—those relating to stale evidence and to the defendant's peace of mind. It does not mean that the obligation is destroyed, as evidenced by the fact that the obligation can be sued on in another jurisdiction with a longer statute. There-

252. This assumes removal is technically feasible without damage to the land.
253. Apparently this concept is limited to Anglo-American law.
254. This assumes that for purposes of the conflict of laws the statutes of limitation of both the locus and the forum are characterized as "procedural" and that there are no "borrowing statutes."
fore, a general statute of limitations does not create a right to a judicial declaration that the debt no longer exists, because under the substantive law of the state it does exist. It is well-settled that the courts will not entertain a suit to remove a debt or judgment as a cloud on title where the sole basis for relief is that enforcement of the debt against the obligor is barred by the statute of limitations, without requiring payment of the debt as a condition to relief. This is merely the court's method of obtaining payment and removing the cloud; the result is the same as where the plaintiff has paid previously. The real basis of the decisions is that a debt unenforceable because of the statute of limitations is not a cloud on title—unless paid, it is a subsisting obligation, which happens to be unenforceable in the particular jurisdiction. Here the distinction between affirmative and defensive relief is to the nature of the grounds for relief and the substantive basis of the claim. There simply is no right to any relief on the ground that the debt is barred by the statute of limitations; there is a defense in a suit on the debt, because the legislature has specifically authorized the defense at that time. The heirs of the debtor are in no better position and cannot obtain relief absent payment.

However, in *Cunningham v. Davidoff*, it was held that a non-assuming grantee could have the mortgage removed as a cloud on his title on the ground that enforcement of the debt against the mortgagor was barred by the statute of limitations and presumption of payment without being required to pay the debt. The court stated that the plaintiff would not be required to "do equity," since he had not assumed the debt and thus was under no "moral obligation" to pay it. The decision is justifiable on grounds other than the moral nature of the grantee's duty. Where the debtor is involved, the security is indistinguishable from the debt; the debtor's rights against the mortgagor are not enlarged by lapse of time. As long as he owes the debt, the mortgage is an encumbrance against his property which he cannot remove. But when the property is transferred subject to the mortgage, the property is encumbered, so far as the situs is concerned, only as long as the debt is enforceable against the debtor there. The debtor no longer has the property and could never bring an affirmative action to have the mortgage removed as a cloud on his title; whenever sued at the situs, he always has the defense of the statute of limitations. As against the non-assuming grantee, the mortgagee's rights are destroyed.


257. 187 Md. 194, 46 A.2d 633 (1946).
when he can no longer enforce the debt against the debtor at the situs. The outstanding mortgage then constitutes a cloud on the grantee's title, which he can remove. Whether payment of the debt as a condition to relief should be required is another question; it might be argued that although he did not receive the money advanced to the debtor, the purchase price was reduced because of the outstanding debt and so, he should be required to pay the creditor. Such a requirement would be one other than that the grantee was required to perform under his contract with the debtor. Under the circumstances of a particular case, this might be proper. Generally, however, since the creditor could have enforced his right against the debtor and the land earlier, the case does not seem a proper one for conditional relief. In any event, the difference in result between the cases involving the debtor and a non-assuming grantee is due to the fact that the latter has a substantive right which he is trying to enforce while the former does not.

The general statute of limitations must be distinguished from a statute which creates an affirmative right due to lapse of time in enforcing a debt. A state may decide by legislation that the right as well as the remedy should be extinguished by lapse of time. Under such statutes the debt is destroyed, so the outstanding instrument does constitute a cloud on title which the plaintiff should be permitted to remove. The imposition of payment of the debt as a condition is improper, since according to the legislature there is no debt. The court should not use its power to grant conditional relief to revive an obligation which the legislature has expressly declared no longer exists. Of course, the court must interpret the particular statute, but once it decides that it destroys the debt, then it should be immaterial whether affirmative or defensive relief is involved. This was the approach followed in Burroughs v. Burroughs. The statute provided that the lien was extinguished by lapse of time. The court construed this as authorizing an action to quiet title by the debtor on that ground alone without requiring payment of the mortgage debt, although in the absence of the statute an action on those grounds could not be maintained.

On the same basis it was held in Huggins v. Johnston, that where the statute authorizing contribution among joint tortfeasors barred an action after a certain time, the right to contribution was destroyed and the non-paying tortfeasor could enjoin actions by the other attempting to obtain contribution, without being required to pay his share of the original judgment as a condition to relief. Since the right was lost by lapse of time—here was a right not recognized by the common law.
rather than the right merely being unenforceable, the court would not use its power to grant conditional relief to thwart the will of the legislature.\textsuperscript{263} Here, as in the cases involving general statutes of limitations, the court's power to grant conditional relief must be considered in relation to the substantive rights involved.

A presumption of payment falls somewhere in between a general statute of limitations and one destroying the obligation. It represents the recognition by the legislature that obligations may have been paid, but the instrument representing the obligation has not been discharged. Unlike a general statute of limitations it is not concerned with stale evidence and does not attempt to be a statute of rest, since it does not bar an action. In accord with the legislature's judgment as to human experience, it merely says that it is unlikely that a party has been owed an obligation for a certain time, has received no payment on it and has taken no action.\textsuperscript{264} It is unlike a statute destroying the right in that the presumption can be rebutted and the right still enforced. It may then be asked whether a plaintiff can sue to prevent the enforcement of a debt or remove an instrument as a cloud on title on the basis of the presumption of payment. Since payment would justify such an action and under the statute payment is presumed, the existence of such a statute should authorize the action. If an action on those grounds is made conditional on the payment of the debt, then the plaintiff is not given the benefit of the presumption. Such an approach would limit the statute to a defensive remedy and the affirmative-defensive distinction would again be made. As indicated above, the presumption of payment is unlike a general statute of limitations in that it relates to the right of the creditor to receive payment and not merely to his remedy to enforce payment.

With this in mind the court in \textit{Downs v. Sooy},\textsuperscript{265} held that a plaintiff could enjoin foreclosure of a mortgage on the ground that payment had not been made for the period prescribed by the statute without paying the debt as a condition to relief. The court observed that he was entitled to the presumption; if it was rebutted, then he was entitled

\textsuperscript{263} But see \textit{Lesser v. Lesser}, 134 Conn. 418, 58 A.2d 512 (1948). There the statute authorized suit to quiet title where no payment had been made, but did not expressly exclude equitable considerations. Although not requiring payment in the instant case, the court said that it would apply a case-by-case approach. It indicated that in a commercial transaction, as opposed to the family one involved there, it might require payment. The burden should not be on the legislature to expressly prohibit the court's using conditional relief to defeat the purpose of the statute.

\textsuperscript{266} Partial payment usually prevents operation of the presumption; the period runs anew after the partial payment.

\textsuperscript{265} 28 N.J. Eq. 55 (Ch. 1877).
to no relief substantively (he, of course, could pay the debt), but if not, then the mortgage was paid and the defendant would be enjoined from foreclosing in the same manner as if a prior cash payment had been the basis of the action.

However, a later case in the same jurisdiction,266 refused to entertain an action to quiet title on the ground that the mortgage was presumed paid by lapse of time. It said that in Downs v. Sooy there were factors present which were absent in the case at bar, but the court did not elaborate. The cases seem indistinguishable, so apparently the former case was overruled sub silentio. Also in Cunningham v. Davidoff,267 where it was held that neither the general statute of limitations nor the presumption of payment barred a non-assuming grantee,268 the court observed that ordinarily payment would be required against the debtor even if the grounds were presumption of payment.

It is submitted that the reasoning of Downs v. Sooy is correct and that courts that do not follow it overlook the distinction between the presumption of payment and the general statute of limitations. The former creates a substantive right, the latter a defensive remedy. By using its power to grant conditional relief, the court is really destroying a right created by the legislature. Moreover, in the area of statutes of limitations and presumptions of payment, as indicated previously, the issue is not really one of conditional relief, though the courts talk in those terms, but one of whether the plaintiff has an affirmative right. It is hoped that the courts will not treat such problems as involving conditional relief and not use its power to grant such relief to destroy legislatively-created rights.

3. Minority and incompetency

The defenses of minority and incompetency are generally treated the same in actions for affirmative relief as when they are asserted defensively.269 The courts have not used their power to grant conditional relief to defeat the legislative policy protecting such persons. As the court observed in More v. More,270 in setting aside a deed by an incompetent without requiring return of the consideration:

The court may refuse to exercise the power (to rescind), in certain cases, for failure of the injured party to avail himself of his right to rescind, but not in a case like this, where the injured party was unable

266. Hollings v. Hollings, supra note 255.
267. Supra note 257.
268. See the discussion at note 257 supra and accompanying text.
270. 138 Cal. 489, 65 Pac. 1044, 1046 (1901).
to pay back the money, and his inability was the natural, and, as such, to be anticipated, result of the act of the defendants in advancing money to a person so irresponsible; where, also, the same influences that made it practicable to defraud him would deter him from seeking relief from the fraud.

In this area the court recognizes the substantive basis of protection of such persons and does not use its power to grant conditional relief to defeat the underlying policy. Protection is fully afforded whether affirmative or defensive relief is sought. As indicated by both past and subsequent discussion, the courts do not always follow this approach in other areas.

4. Homestead exemptions

One of those areas is that of homestead exemptions. Whether legislative protection to the homestead is fully afforded by the courts may well depend on whether the claim of homestead is asserted as a defense or whether the right must be protected affirmatively, in which case the benefit is not given. The refusal to give the benefit is based on the court's power to award conditional relief. States have protected homesteads in various ways, such as preventing their alienation or encumbrance either absolutely or only under prescribed procedures, or by rendering them immune from judgments. Thus, it would be a defense to any action involving contracts to sell or encumber homestead property that such property is protected. The question arises as to whether the same protection is afforded when the owners seek affirmative relief from the improvidence against which the legislature sought to protect them.

Some cases have extended the full protection and have not imposed the requirement of conditional relief to defeat the homestead claim. In Young v. Ashley,271 the husband and wife were permitted to enjoin the cutting of timber on the land pursuant to a lease given in violation of the homestead statute without being required to return the consideration given for the contract. In Lucci v. United Credit & Collection Co.,272 where the statute exempted homestead from execution, the court ordered an execution sale set aside without the requirement that the plaintiff pay the amount of the judgment, though absent the fact that a homestead was involved, payment would be required.273 And in Moore v. Glasscock,274 the owners were permitted to have a deed declared a mortgage on a homestead and thus void without tendering the amount of the debt secured by the mortgage.275 The rationale of these

271. 123 Miss. 693, 86 So. 458 (1920).
273. See the discussion at notes 190–201 supra and accompanying text.
275. The court assumed that if homestead property were not involved, a tender would be required, even though the owner was asserting a defense.
cases is best explained by the following language from *Young v. Ashley*:

It would be a vain and useless thing to require the wife's signature to a conveyance of the homestead if the husband can by his sole contract preclude himself and his wife from resorting to equity to protect it. Against many persons injunction will be the only effectual relief for the protection of the homestead. The maxim that "he who seeks equity must do equity" was not designed to overturn the beneficent public policy of the homestead law or to overturn the settled policy of legislative enactments in the furtherance of public welfare.

Other courts, however, have assumed the very point which this language emphasizes—that the court's power to grant conditional relief in an "equitable action" supersedes legislative policy, or that legislative policy was not intended to limit that power. Thus, in *Alston v. Alston*, the court held that the wife could not set aside a contract made by the husband that assigned homestead rights in violation of statute without reimbursing the assignees for payments made on the contract. Also, in *Jones v. First Nat'l Bank of Ashland*, the husband and wife were not permitted to cancel a mortgage on homestead property due to non-compliance with the statute, without returning anything received on the security of the mortgage. It is interesting to note that the same court refused to require the wife to return monies advanced on security of the mortgage where she was not a party to the original transaction and did not receive the benefits. Despite language indicating high regard for legislative policy, the court is basing its decision on standard applications of principles of conditional relief and ignores the underlying purpose of the statute.

It is submitted that in no case should the party be deprived of the

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276. *Supra* note 271, at 702, 86 So. at 459.
277. 106 Neb. 623, 184 N.W. 82 (1921).
278. 236 Ala. 606, 184 So. 168 (1938).
279. See also *Matthews v. J. S. Caroll Mercantile Co.*, 195 Ala. 501, 70 So. 143 (1915).
281. In the *Leonard* case, *supra* note 280, the court observed:

The homestead rights are designed to protect helpless women and children from the improvident acts of an improvident husband. They are founded in a wise public policy, the State deeming it better that wives and children should have shelter and a place to live than that a creditor should have his debt, unless he secures that debt by obtaining the wife's separate acknowledgement.

We hold that the doctrine that he who seeks equity must do equity has no application whatever to the case made by the bill filed in this proceeding. To so hold would be a mockery of the constitutional and statutory provisions relating to the homestead rights of a wife and would be a perversion of that equitable maxim.

*Id.* at 209, 30 So.2d at 244.
benefits of the homestead statute due to inability to restore the consideration or otherwise furnish conditional relief. Just as in the case of infants and incompetents and as suggested in cases involving allottees of governmental land, if the plaintiff can restore the consideration, then, of course, this should be required in order to prevent unjust enrichment, since the legislature has not provided for forfeiture of the sums advanced. If the other party sued to enforce the contract, the defense of homestead could be asserted without the requirement of return of the consideration. The other party would be entitled to a judgment for any sums advanced as restitutionary damages, but would be left to means of execution other than levying on homestead. In such a case the parties would retain the homestead as the legislature intended. The result should be no different, because the parties have to seek affirmative relief. They must regain full rights in the homestead and should be required to return the consideration only if they have it. If they do not, then this is the price that the legislature has determined the other party must pay due to the need to protect homestead interests. The owners must retain full homestead rights, because the legislature has so provided and did not make protection of those rights depend on whether the owners resorted to affirmative or defensive relief to protect them.

5. Usury statutes

Here, probably more so than in any other area, the result according to many courts, will depend on whether the debtor is seeking affirmative or defensive relief. And the basis of the distinction is that since affirmative relief is almost always "equitable," and "he who seeks equity must do equity,"—the maxim these courts believe to furnish the basis of their power to grant conditional relief—the court can refuse to give him the benefits of the statute and require him to pay the debt and legal interest irrespective of the statutory provisions. Usury statutes are basically of three types: (1) forfeiture only of the usurious interest; (2) forfeiture of all interest; (3) forfeiture of all interest and all or part of principal. Since the most a court requires as a condition to relief is that the plaintiff pay the debt and the legal interest, the result in the first type of statute will not depend on whether the debtor seeks affirmative or defensive relief. The questions presented then are when a party seeking affirmative relief against a usurious transaction can avoid payment of the legal interest when the statute provides for its forfeiture and when he can get the benefit of statutory penalties for usury, resulting in forfeiture of all or part of principal. It should also be noted that as a practical matter, whenever the debtor has given se-

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282. See the discussion of Indian allottees at note 248 supra and accompanying text.
curity for the usurious debt, he will invariably have to seek affirmative relief to avoid the effect of the transaction. For example, if he has given a mortgage or other security interest, the outstanding interest will cloud his title and impair vendibility. It should also be noted that the plaintiff will always have to pay what is due under the statute as a condition to relief. 283

With respect to payment of legal interest, payment has been required by some courts despite the provisions of the statute declaring that the lender is not entitled to such interest. 284 Other courts have granted relief without requiring payment of that interest, in reliance on the statutory provisions in identical situations. 285 The particular type of affirmative relief sought does not affect the court's decision as to whether to apply the statute. The courts are equally divided as to statutory forfeitures of all or part of principal. 286 It is interesting to note that although some courts apply contrary approaches depending on whether the avoidance of legal interest of the claiming of statutory benefits is involved, 287 the majority of the courts passing on both questions have

283. This is simply an application of the general principle that where something is owing, the party must pay that in order to obtain relief.
286. Plaintiff entitled to benefit of statute: Davis v. Elba Bank & Trust Co., 216 Ala. 632, 114 So. 211 (1927); Richter Jewelry Co. v. Schweinert, 125 Fla. 199, 169 So. 750 (1936); Scott v. Austin, supra note 285; McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957); Yowack v. Emery, 118 Tex. 224, 13 S.W.2d 667 (Tex. Civ. App. 1929). Plaintiff not entitled to benefit of statute: Buchanan v. Carolina Mortgage Co., 215 N.C. 247, 195 S.E. 787 (1938); Kenny v. Hinton Hotel, supra note 284; Johnston v. American Fin. Corp., supra note 284; Crisman v. Corbin, supra note 284; St. Germain v. Lapp, supra note 285; Goodwin Co. v. National Discount Corp., 5 Wash.2d 521, 105 P.2d 805 (1940). Some cases have involved improper results based on automatic extensions of concepts. In the McNish case the court held that the conditional vendee did not have to return the chattel as a condition to relief, though the statute provided only for forfeiture of principal and interest on a loan. Since it did not provide for forfeiture of chattels under conditional sales contracts, this aspect of the decision is an unwarranted extension of the principle. In Patterson v. Wyman, 142 Minn. 70, 170 N.W. 928 (1919), the court refused to enforce the provisions of the usury statute of a sister state, since penalty provisions are unenforceable extraterritorially. It also refused to enforce the provisions of its own statute, otherwise applicable, since the note was payable elsewhere. Thus, the plaintiff did not get the benefit of statutory penalties provided by both the statutes of the locus and the forum.
287. St. Germain v. Lapp, supra note 285. See the critical discussion at note 294 infra and accompanying text. The Texas courts may also be following this approach in the opposite direction—plaintiff can get benefit of penalties, but must pay interest. Compare Yowack v. Emery, supra note 286, with Poff v. Rollinsford Sav. Bank, supra note 284. It may be that the Poff case was incorrectly decided in view of the precedent of the higher court.
arrived at the same result: the borrower can take advantage of both provisions or neither.\footnote{288}

It is submitted that the reason for the split is the particular court’s attitude as to whether legislation dealing with usury was written in light of the distinction between affirmative and defensive, really legal and equitable, relief. Moreover, some courts denying the benefits of the statute still consider themselves “courts of equity” and must then combine the maxims, “he who seeks equity must do equity” and “equity abhors a forfeiture” in order to protect the lender against the command of the legislature, even though the legislation is constitutional. This may also be the device the courts employ to deny full effect to usury statutes with which they are not in sympathy.

The language and ratio decidendi of the decisions are most illustrative of the contrasting approaches the courts take. Thus, the court in \textit{Vanasse v. Esterman},\footnote{289} found the statute inapplicable in a proceeding by the borrower to obtain affirmative relief, observing: “The statute does not fit this case. It applies where one to whom the usurious contract runs becomes plaintiff in an action on the contract to recover against the other party to the contract. This is not a proceeding to enforce an alleged usurious agreement, but a suit by the promissor asking affirmative aid of equity, which he can only obtain by doing equity.” The court in \textit{Johnston v. American Fin. Corp.},\footnote{290} also observed that “equity abhorred a forfeiture,” and that therefore, the statute was limited to “legal actions,” where the borrower was not seeking affirmative equitable relief. Another way is to put the burden on the legislature. This was the approach of the court in \textit{Crisman v. Corbin},\footnote{291} where it was held that unless the statute \textit{expressly} prohibited the court from imposing conditional relief and requiring that the borrower “do equity,” the statute would be construed as authorizing that type of relief. The court also applied the rule of construction that “statutes in derogation of the common law and penal statutes are to be strictly construed.”\footnote{292} It must be assumed then that whenever the legislature enacts a statute under its police power to regulate economic matters, it keeps in mind the distinction between legal and equitable relief, even


\footnote{289. 147 Wash. at 301, 265 Pac. at 738.}

\footnote{290. 182 Okla. at 569, 79 P.2d at 245.}

\footnote{291. \textit{Supra} note 284.}

\footnote{292. See also Turner v. Merchant’s Bank, 126 Ala. 397, 28 So. 469 (1900), where the statute only provided criminal sanctions. Where the statute provided civil remedies, the plaintiff was held entitled to them. Lewis v. Hickman, \textit{supra} note 285; Davis v. Elba Bank, \textit{supra} note 286. The proper approach was followed under each statute.}
though law and equity have been merged! Where the court clearly
ignores the legislative mandate, as in St. Germain v. Lapp,293 the
court differentiates between the requirement to pay legal interest and
forfeiture of all or part of principal. The statute expressly provided
that the lender was to forfeit principal and interest. Since the plaintiff
sought equitable relief, this determination was not found to be bind-
ing on the court, which held that the plaintiff was entitled only to
avoid payment of the interest. The court observed: "A court of equity,
however, ought to differentiate between those two deprivations. . . .
To require the borrower to return the amount of the money loaned
is unquestionably equitable and is not without a moral base. Such a
rule is consistent with equity's aversion to penalties and especially its
tendency to look with stern disfavor upon forfeitures and to relieve
against them." 294 The court ignores that the legislature as well as the
courts may decide what is "equitable" and what is "moral." The court
should not refuse to enforce a legislative policy that it considers "in-
equitable." The legislative determination that protection of certain
interests justifies "inequitable results" and "forfeitures" must be re-
spected so long as that determination is constitutional.

The language and reasoning of the court in Richter Jewelry Co. v.
Schweinert,295 where the court did apply the statutory provisions pro-
viding for non-payment of interest and forfeiture of principal, al-
though the borrower sought "affirmative equitable relief," is far more
persuasive, as it recognizes the proper relationship between the courts
and the legislature and does not make application of legislative policy
dependent upon the nature of the relief sought. The court emphasized
that it could not ignore legislative policy so long as the statute was
constitutional. It also noted that the legislature could limit the court's
power to impose conditional relief just as it could limit its power to
grant any other type of relief. The court observed:

Therefore, when a suit is brought by the borrower to cancel such a con-
tract and require the surrender of the security, there is no legal or equi-
table duty resting upon the borrower to offer to return any part of the
money loaned. It must be conceded that this statute is a harsh and
rigorous statute, but the legislature was dealing with a harsh and some-
times unscrupulous business . . . and evidently resorted to these meas-
ures to protect unfortunate and necessitous borrowers.296

Basically, then, the result in such cases depends on whether the court
will recognize that when the legislature is concerned with regulating
economic interests, it is not concerned with distinctions relating to the
type of relief sought. Unless the legislature expressly makes the dis-

293. Supra note 285.
294. Id. at 52, 48 A.2d at 186.
295. Supra note 286.
296. Id. at 220-21, 169 So. at 759.
tinction, the court should not. The borrower should always receive the benefits given by the usury statute irrespective of the type of relief he seeks. Otherwise, the lender can completely frustrate the policy of the statute by requiring the giving of security, since the borrower must resort to affirmative relief in "the court of equity" to obtain its return. It is hoped that the courts will realize that here, as elsewhere, its power to grant conditional relief should not be used to frustrate legislative policy. The implementation of such policy should not depend on the type of remedy to which, under the circumstances, the borrower must resort. When the courts realize this essential fact, they will give the borrower the full benefit of the usury statutes. The legislature as well as the courts may decide what constitutes a "just result," and when that determination is constitutional, the courts must honor it. Justice is not accomplished by thwarting constitutional legislative policy.

6. Improper conduct of the defendant

The question presented in this area is when the defendant's own conduct bars him from obtaining conditional relief, though absent such conduct the case would be a proper one for its imposition. The court will not permit the defendant to obtain the benefits of a transaction where his improper conduct would bar him from maintaining an independent action for them. It is interesting to note that where legislative policy is not involved, the courts will not permit their power to grant conditional relief to be used to enable the defendant to obtain illegal benefits.

This principle has often been applied against breaching fiduciaries such as attorneys and corporate directors. In *Warner v. Flack*, 297 a client sued to set aside a deed given to his attorney in partial payment for services. Originally the parties had entered into a type of contingent fee relationship that was illegal. As a condition to recission the client, of course, was required to return the actual consideration received for the property, but was not required to abide by the contingent fee arrangement, though it formed the basis for part of the transfer. Since the attorney could not have recovered the contingent fee in an independent action due to its illegality, the court would not give him the benefits of the illegal agreement under its power to condition relief. So too, in *Sullivan v. Morey*, 298 where the plaintiff sued to cancel notes and mortgages given to an attorney who had defended him in criminal proceedings as security for payment for services, relief was conditioned on payment for legitimate services, but no restitution was required to the extent that it would reimburse the attorney for hypothecating bail bonds.

297. 278 Ill. 309, 116 N.E. 197 (1917).
Moreover, the court will not hesitate to effect a forfeiture of even the reasonable value of the services, where under the substantive law the attorneys are not entitled to any compensation because of their wrongful conduct. In *East T. & W.N.C. Ry. v. Robinson*,\(^{299}\) the attorneys, who were also officers of the railroad, entered into an illegal agreement to represent it in seeking fare increases. The fees were to be divided with other officers who were not lawyers. Although the increase was granted, the new management refused to pay the fees. The attorneys sued to recover the fees in the law court—the state was still under a separate system—and the railroad sued in the chancery court to enjoin the action. The injunction was granted unconditionally; the court refused to condition relief upon payment to the attorneys of the reasonable value of their services. Since the agreement was unlawful, and further, they had engaged in fee-splitting with a layman, under the substantive law they were not entitled to any compensation. In effect they were barred by their conduct from seeking conditional relief just as they would have been barred from seeking affirmative relief.\(^{300}\) The main thrust of the decision, however, was that the contract was unenforceable on policy grounds, and, therefore, could not be made the basis of conditional relief. The court stated: "We prefer to plant our decision upon the ground that the contract, having been obtained by fraud and concealment of material facts, is void; and that the defendants, having violated the trust and confidence reposed in them . . . are in equity and good conscience entitled to nothing for their services."\(^{301}\)

On the same reasoning it was held in *Evans v. Ideal Brick & Brickcrete Mfg. Co.*,\(^{302}\) that a corporation seeking to cancel a sale of stock to a director for less than a par value, which sales were prohibited by constitutional provision, was not required to return the consideration received as a condition to relief. Since the transaction was completely void, the director could not have recovered the consideration in an independent action. Note that the improper conduct as such does not bar the defendant from obtaining conditional relief; he is not being "punished" in that sense. Rather, there is no substantive right to the return of the consideration because of the nature of the transaction and the defendant's fiduciary character. Although it has been submitted that good faith-bad faith distinctions should not be used except where absolutely necessary to determine the propriety of conditional relief,\(^{303}\) there can be no objection to requiring a different standard of

\(^{299}\) 19 Tenn. App. 265, 86 S.W.2d 433 (1935).

\(^{300}\) The court observed that the result would have been the same if the defendants had been the plaintiff in the equity suit—the doctrine was inapplicable to enforce a non-existent right.

\(^{301}\) *East T. & W.N.C. Ry.*, *supra* note 299, at 277, 86 S.W.2d at 440.

\(^{302}\) 287 P.2d 454 (Okla. 1955).

\(^{303}\) See the previous discussion on recovery for improvements.
conduct on the part of fiduciaries than of others in order to protect certain policies. Without considering the soundness of the substantive rule, the important consideration is that the substantive rule is not altered merely because relief can be given under the guise of a conditional decree. 304

However, in some instances the court has seized upon the fiduciary relationship as such to refuse to grant conditional relief despite the absence of conflicting policies and a substantive rule denying relief to fiduciaries. For example, in Cawthon v. Cockell,305 the court held that an agent who procured a deed from the principal by fraudulent representations was not entitled to reimbursement for the payment of taxes and the making of valuable improvements in a suit by the principal to recover the property. Such a decision seems erroneous, since here the agent is in no different position than any other party who obtained property by fraud. The grounds of relief do not relate to the breach of the fiduciary relationship as such—even though what constitutes fraud may vary because of the relationship. This is simply a case of rescission for fraud and no policy is adversely affected by the granting of conditional relief. It is hoped that the courts will realize the distinction between the cases where the breach of the fiduciary relationship destroys the substantive right of the fiduciary to any relief and those where, although the defendant happens to be a fiduciary, the transaction would be equally voidable if a non-fiduciary were involved.

The result in a case such as Stephenson v. Golden,306 may be more justifiable, though there, interestingly enough, the court required return of the consideration while denying reimbursement for improvements. Here the grounds of rescission involved conduct that would render the transaction voidable only as to a fiduciary, namely that he acquired property he was to purchase for the principal for his own use. The result depended on the substantive law of agency, which provides that a defaulting agent can only recover the purchase price paid. While the soundness of such a rule may be questioned, particularly since the principal gets the value of the improvements307 nonetheless, the court may have believed that such a result was necessary in order to protect against improper conduct by fiduciaries. In any event, the case was not one where the fiduciary was in no different position than another wrongful party—there was a wrong only because he was a fiduciary. The court should always be careful so as not to deny condi-

304. See also Mortgage Land Inv. Co. v. McMains, 172 Minn. 110, 215 N.W. 192 (1927), where a corporation was not required to return the consideration to directors who wrongfully issued stock to themselves or to compensate them for legal services for which the stock was purportedly payment.
305. 121 S.W.2d 414 (Tex. Civ. App. 1938).
307. Again unjust enrichment results because of the character of the defendant’s action.
tional relief to a fiduciary where the same conduct by a non-fiduciary would be equally improper.

Another class of cases involves conduct by the individual defendant with respect to the transaction which will cause the court to refuse conditional relief. Again, since a court administering civil relief should not "punish" improper conduct, a strong public interest should have to be adversely affected by the granting of relief before a court should refuse it on those grounds. On the other hand, there may be circumstances where a party by his conduct chooses to "waive" certain benefits in hopes of gaining still greater ones, and when he fails to obtain them, seeks the former as a condition to relief granted against him. Where a party has chosen not to take certain benefits in hopes of gaining others by improper conduct, it seems proper on policy grounds to deny him conditional relief securing the former benefits; otherwise he has a guarantee that he will gain something from the very conduct that is improper. This factor must be weighed against the possibility of the plaintiff's being unjustly enriched if conditional relief is denied.

One of the best examples of improper conduct having an adverse effect on a strong public interest and justifying a denial of conditional relief would be an abuse of corporate power. Thus, in Thompson v. Davis, a corporation which executed an unauthorized mortgage, purchased the property at foreclosure and sold the property to a stranger prior to the court's reversal of the foreclosure decree, was not entitled to reimbursement of the proceeds from the sale in a suit by the mortgagee. The need to insure that corporations complied with limitations on their power justified the court's refusal to impose conditional relief against the mortgagee. It must be remembered that at times unjust enrichment must be necessary to enable the state to accomplish a particular policy. It is one thing for the courts to "punish" by refusing conditional relief: it is another to determine that it is in the public interest that no benefits, even compensable ones, be derived from certain illegal transactions. Another strong interest would be the preservation of the integrity of the marital relationship. On that basis, in Patterson v. Patterson, where the wife conveyed property to the husband on his representation that he would abandon a paramour, but, with the intent to violate the agreement, he continued to live with the paramour and conveyed the property to her, the wife was not required to reimburse the paramour for the monies she paid to the husband in the wife's suit to regain the property. The court could have based its decision on the ground that the plaintiff did not receive any of the consideration, but instead took the position that since the paramour and

308. 297 Ill. 11, 130 N.E. 455 (1921).
309. This is what the court does when it refuses enforcement of contracts as to expectancy interests on grounds of illegality. The parties are left to adjust differences among themselves.
husband were both parties to the fraud, they would have to adjust accounts among themselves.

The difficulty of drawing the line as to when the injury to the public interest is such as to justify the refusal of conditional relief despite the resulting unjust enrichment is indicated by a comparison of two cases involving services rendered in connection with an improper transaction. In Tuttle v. Wyman,\(^3\) it was held that where a client dismissed the claim in violation of his agreement with an attorney in order to defeat the latter's right to a legitimate contingent fee, in the attorney's suit to enforce a constructive trust in the promised realty, he was not required as a condition to relief, to reimburse the defendant for services rendered on behalf of the property. But in East & West Coast Serv. Corp. v. Papahagis,\(^4\) where the manager of plaintiff's checking concession in a hotel obtained the concession for himself in violation of an agreement to renew it for the plaintiff, in the plaintiff's suit for an accounting, the manager was entitled to deduct the expenses made in procuring and maintaining the concession and a reasonable allowance for his managerial services during that time. In neither case does the injury to the public interest seem so great as to justify a denial of conditional relief. The party who settled a case in order to defraud his attorney seems no different from the ordinary wrongdoer and should not be denied conditional relief because of his conduct.

The most interesting cases are those where the defendant can be said to have waived his right to conditional relief by choosing to gain greater benefits from improper conduct. It seems unjust to give the defendant reimbursement for actions taken pursuant to an improper scheme, or where he has spurned the same benefits he is now seeking when proffered previously, in an effort to obtain more. On the other hand, the fact does remain that the plaintiff may be unjustly enriched by the failure to order conditional relief.

An example of “spurned benefits” occurred in Nugent v. Stofella.\(^5\) The plaintiff purchased mortgaged property and attempted to pay the debt to the mortgagee. The mortgagee avoided him and procured title himself under an improper foreclosure sale. The plaintiff was permitted to quiet title in himself and was not required to pay the mortgage as a condition to relief. The court stated that it would not protect a fraudulent party where he fared badly in his venture. It also observed that if it required payment, the defendant might even be better off than he would have been if he had successfully obtained the property. The case is difficult, since as the court admitted, the plaintiff was unjustly enriched. Still, unjust enrichment is not a universal vice if other policies are fostered by permitting it in certain instances. It does

\(^{311}\) 149 Neb. 769, 32 N.W.2d 742 (1948).
\(^{312}\) 344 Pa. 188, 25 A.2d 339 (1948).
\(^{313}\) 151, 84 Pac. 910 (1906).
not seem wise to allow a party to refuse a benefit, fraudulently attempt to get more, and when he has been unsuccessful, seek to regain the original benefit. It is proper to say that the mortgagee waived his right to payment of the mortgage when he rejected it. He chose to rely on his ability to obtain the land; when that failed, there was nothing left to be given to him. Here, unjust enrichment must be balanced against the harm in giving a guarantee to a party perpetuating a wrong that he will receive some benefit even if unsuccessful. When that is considered, the result seems correct.

In *Sketchley v. Lipkin*, the plaintiff developed a device for cleaning sewers and communicated the knowledge to the defendant, his son-in-law, who in turn promised to reduce their agreement, to manufacture and sell the machine, to writing and to carry it out. Instead, he proceeded to manufacture and market the machine himself. In the plaintiff's suit to enjoin him from doing so, it was held that the defendant was not entitled to reimbursement for money invested in the construction of the machine, even though the machine was taken by the plaintiff. Here, the defendant chose not to rely on the agreement, but rather attempted to gain the benefits through independent action, ignoring the agreement. The plaintiff's action was not to rescind an agreement that was being carried out by the defendant. Moreover, the plaintiff had to take the machine to prevent its use by the defendant. With respect to the defendant's claim for reimbursement the court observed:

Such reasoning involves the erroneous notion that if a wrongdoer were apprehended in the act of stealing his neighbor's herds after he had driven them 500 miles toward the market he would be liable for their restoration only on condition that the neighbor reimburse him for the amounts expended on the long journey.

The same principle was applied in *Peoples First Nat'l Bank & Trust Co. v. Ratajski*.* The decedent's niece had taken care of him for some time with the intention, as the court found, of obtaining all his property. She succeeded in doing so through fraudulent representations and undue influence. In an action by the administrator to set aside the inter vivos transfers, the court held that the niece was not entitled to reimbursement as a condition to relief. The services were in furtherance of a scheme to enrich herself and were undertaken on a gamble—if she were successful, she would obtain his property. There was no implied promise on the decedent's part to pay for the services; for all he knew she intended them as a gift. The unjust enrichment does not appear improper, since an opposite result would be to change the nature of the services from those rendered in the hopes of obtaining property to those rendered under an implied obligation to pay.

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315. Id. at 856, 222 P.2d at 932.
In this area, the only concern is that the courts not use the defendant's conduct to justify a refusal to grant conditional relief unless such conduct adversely affects some substantial public interest or was part of an improper plan to obtain future benefits. The court should be certain that either of these situations is present before refusing conditional relief due to the conduct of the defendant.

7. Inability to restore the status quo upon rescission

The general rule is that a party cannot rescind if he is unable or unwilling to restore the status quo by returning the consideration received; but in certain instances the plaintiff may obtain relief despite such inability.

Assuming that the consideration was received by the plaintiff and was of benefit to him, that is, restoration is affirmatively required, he will be excused if the restoration was rendered impossible due to the defendant's conduct. These cases are fairly obvious. In Brown v. Norman, for example, where the plaintiff exchanged land for the defendant's interest in a partnership and the transaction forced dissolution of the partnership under the original articles, the plaintiff could obtain rescission, though the defendant could not be restored to the partnership, which had ceased to exist. The defendant's own act, as he knew, rendered restoration impossible. He must bear the loss rather than that the plaintiff be denied the opportunity to rescind. In Merrifield v. McClay, where the seller refused to take back the horse upon the buyer's justifiable offer to rescind and the buyer left it at a livery stable at the seller's expense, where it was sold for the feed bill, the buyer was entitled to rescission. The same principle may be applicable where the defendant is not necessarily guilty of any act rendering restoration impossible, but the inability to restore is not the fault of the plaintiff. This was evidenced in Long v. Calloway, where the defendant exchanged his interest in a mineral lease for the plaintiff's land. Upon plaintiff's accession to the interest, the other lessees sued for partition, to which the defendant was a party. The interest was sold by judicial decree and the defendant received his share of the proceeds. The court held that the plaintiff could rescind, although the defendant could not get back the oil and gas lease in specie.

Where the inability to restore the status quo is due to the plaintiff's actions—generally, disposing of the consideration he received—whether

317. This also assumes that restoration is not excused on policy grounds, e.g., usury.
318. 65 Miss. 369, 4 So. 293 (1888).
319. 72 Ore. 90, 142 Pac. 587 (1914).
the plaintiff can obtain rescission is dependent on whether he can furnish substituted redress; if this is feasible, rescission is permitted, though the status quo cannot be restored in specie. The easiest situation is where the payment of money will adequately compensate the defendant. On that basis rescission of the purchase of an oil lease was permitted, even though the plaintiff had disposed of some of the oil, upon payment of its value.\(^{321}\) Also, a purchaser of a business could rescind, though he had sold some of the goods and others had been damaged, since the court could deduct the value of the goods from the purchase price ordered to be returned.\(^{322}\) Where the only consideration flowing to the plaintiff was money and he has transferred goods in exchange, he can obtain rescission, though he cannot return the money; the goods will be sold, the price deducted, and the balance given to the plaintiff.\(^{323}\) By the same token, where different property of the kind disposed of can be returned in specie, this is permitted. The best example is corporate stock; where a party seeks to rescind a sale of stock, but has disposed of the stock, he can obtain rescission by returning the equivalent class of stock in the same corporation, since shares represent only an aliquot interest in the corporation.\(^{324}\)

In some cases, however, the court must issue a more complex decree in order to substantially restore the status quo and will do so whenever possible. Even if there is some doubt as to the efficacy of the decree, it should be resolved against the defendant, since he is the wrongdoer. In situations such as this that fact becomes most relevant.\(^{325}\)

In *William Whitman Co. v. Universal Oil Prods. Co.*,\(^{326}\) the plaintiff sued to rescind settlement of a suit on the ground that he had been induced to settle because of a court judgment affirming the validity of the defendant's patent, which judgment was later vacated, because the defendant had bribed the judge. The plaintiff did receive certain benefits because of the settlement, which were the discontinuance of an existing infringement suit against it by the defendant, settlement of another suit by a third party against the plaintiff, and the use of the defendant's services and patents for a number of years. The court ordered rescission despite the defendant's claim that restoration of the status quo was impossible. Under the terms of the decree the plaintiff was entitled to recover the difference between the amount it paid to the defendant as royalties under the settlement agreement and the


\(^{322}\) Bellefeuille v. Medeiros, 335 Mass. 262, 139 N.E.2d 413 (1957). This is also applicable where the plaintiff received a negotiable instrument. Harnden v. Hadfield, 119 Kan. 525, 215 Pac. 441 (1923).

\(^{323}\) Thackrach v. Haas, 119 U.S. 499 (1886).

\(^{324}\) Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5 (Ch. 1946).

\(^{325}\) Distinctions based on culpability are not improper in the absence of another alternative.

amount expended in defense of the suits less the value of the services it received from the defendant. The value of the services was the royalties less the defendant's profit, which was set as twenty-five per cent.

In *Hammond v. Pennock*, the plaintiff had transferred real and personal property to the defendant in exchange for certain real property. He had also agreed to pay the encumbrances on the land he transferred. Meanwhile, the defendant sold the personality and contracted to sell some of the realty, covenanting to remove the encumbrances if the plaintiff had not done so. In the plaintiff’s suit to rescind for fraud the court granted relief upon the following terms: (1) the defendant would reconvey the unsold portion of the property; (2) he would assign the contract of sale to the plaintiff; (3) he would pay the plaintiff the proceeds he had received from the sales he made; and (4) the plaintiff would have to indemnify the defendant for any loss he might suffer due to outstanding encumbrances.

These cases indicate the measures the court will take to avoid permitting the defendant’s preventing rescission due to the plaintiff’s inability to restore the *status quo*. Moreover, the plaintiff may probably avoid the requirement of restoration by setting off monies due him from the defendant.

In summary, failure to return the situation to the *status quo* will be excused if it was due to the defendant’s conduct or if substituted redress can be given. The courts have been most liberal in this respect, which is proper, since the plaintiff is the party entitled to rescind.

D. Conditional Relief in Actions Denominated as “Legal”

Having considered the extent of the court’s power to grant conditional relief, we may now inquire as to whether such relief is or should be appropriate where the theory of the action was historically considered “legal.” As indicated, conditional relief is most efficaciously administered where specific or declaratory relief is sought. Where damages are sought, the result will usually be achieved by allowing counterclaims or set-offs. If all specific relief formerly had been administered by the courts of chancery, then the problems discussed in this section would not arise. We could refer to what was formerly a remedy at law as damages and what was formerly a remedy in equity as specific relief. Alas, history does not operate so smoothly. For the law

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327. 61 N.Y. 145 (1874).
329. *But see* Kundel v. Portz, 301 Mich. 195, 3 N.W.2d 61 (1942). In the vendee’s action to recover money paid under the contract, relief was conditioned upon the buyer’s returning what he had received. The suit was characterized as one for rescission, so conditional relief was applicable.
330. I mean to include, of course, declaratory relief as well.
courts did grant specific relief of some sort, namely actions for replevin and ejectment; they also developed the extraordinary legal remedies, which, however, were administered generally in the same manner as equitable relief. The distinction between legal specific relief and equitable specific relief is still meaningful today insofar as it relates to the right to trial by jury—assuming, as in most states, that the right is guaranteed "as heretofore." So, when the theory of the action is replevin or ejectment, there is a jury trial; also many states have special procedures as to those actions, particularly with respect to possession of the property pending disposition of the case. Since distinctions between legal and equitable remedies are necessary so long as jury trials are not authorized in equitable actions, when that issue is involved, they must be made. But, should it be necessary to make them in any other situation, where law and equity are merged into a single system? The type of relief awarded should not depend on whether the theory of the action is legal or equitable except as required by constitutional mandate.

Unfortunately, however, that distinction is still being made in the matter of conditional relief. Too many courts are reluctant to abandon distinctions between law and equity and preserve them wherever possible, as if it would be "immoral" not to do so. Also, when a court believes that its power to grant conditional relief is based on the maxim, "he who seeks equity must do equity," it mechanically refuses to apply the principle to a "legal" action. As indicated previously, this is not the basis of the court's power. Such a power was exercised by the court of chancery long before the maxim came into existence, and it would seem that any court could condition relief in order to achieve a just result. Despite such an analysis the courts have not generally granted conditional relief where ejectment and replevin are involved.

As to replevin, the distinction is graphically illustrated by Mac-Donald v. Leverington Const. Co., which represents the general view as to the nature of a replevin action. The defendant contended that in good faith he had made improvements on the shovel, which had enhanced its value. The court refused to order reimbursement for this amount as a condition to relief, since it held that the only issue in a replevin action is which party is entitled to possession. The court observed that if the plaintiff had elected to recover on the counterbond, then the defendant could offset the value of the improvements, since the plaintiff was entitled only to the unimproved value of the chattel. This distinction was also recognized in John V. Farwell Co. v. Hil-

331. For a suggestion that this distinction be abolished by legislation see Van Hecke, Trial by Jury in Equity Cases, 31 N.C.L. Rev. 157 (1953).
332. See the discussion at notes 11-12 supra and accompanying text.
333. This would include a law court under a separate system,
334. 331 Pa. 381, 200 Atl. 8 (1938).
In that case the vendor was permitted to replevy goods obtained by fraud without returning the consideration, since the sole issue was the right to possession. Here, the vendor could obviously recover this amount in an independent action, necessitating two suits. The court did not consider whether it could have conditioned relief upon the return. Had the vendee brought suit to rescind and recover the property, the entire controversy could have been adjudicated in a single action.

The distinction is likewise demonstrated by the holding in *Sartain v. Dixie Coal & Iron Co.*, where under a separate system of law and equity the chancery court had jurisdiction over replevin actions. Since the suit was brought in the chancery court, the court required return of the consideration received as a condition to replevying the property. The court observed that the “maxim” was applicable whenever the plaintiff came into the chancery court either under its original or statutory “jurisdiction.” The result here depended on the court in which suit was brought.

In ejectment actions the distinction is equally sharp, causing an absurd result. The question here arises as to the defendant’s right to be reimbursed for the enhanced value of the land due to his improvements, as a condition to relief. Whenever the plaintiff seeks equitable relief as to his interest in land, e.g., an action to quiet title, reimbursement for improvements is generally a condition to relief. But if the plaintiff is out of possession so that he must bring ejectment, an entirely different rule applies.

In the first place, some states recognize an independent action for recovery of improvements by certain occupiers either under their common law or under so-called “betterment” statutes. Where such is recognized, no problem arises, since the defendant can counterclaim for the value of the improvements in the ejectment action. However, some states do not recognize an independent right of recovery; recovery, if any, can be had only when the owner as plaintiff seeks relief with respect to the land. Without considering the merits of a distinction based on the conference of jurisdiction between the chancery and common law courts, the rule is that the plaintiff should be required to reimburse the defendant for the improvements as a condition to relief.

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335. 84 Fed. 293 (E.D.Wis. 1897).
336. The view also is that statutes authorizing counterclaims are inapplicable to replevin actions, as indicated in the *MacDonald* case, supra note 334.
337. 150 Tenn. 663, 266 S.W. 313 (1924).
339. Subject to the exceptions previously discussed.
341. Griswold v. Bragg, 6 Fed. 342 (D.Conn. 1880); State v. Jones, 335 S.W.2d 468 (Mo. App. 1960). In *Griswold*, a federal court upheld their constitutionality; in *Jones* the court held that there was a right to a jury trial.
on whether the owner seeks relief, it is submitted that the right to conditional relief should not depend on whether the theory of the plaintiff's action is legal or equitable. This is not the position, however, that the courts have taken. Although they will under traditional principles of conditional relief order reimbursement when the theory of the plaintiff's claim is equitable, they deny any relief to the defendant if the plaintiff brings ejectment. If the plaintiff seeks mesne profits, then the defendant can set off the value of the improvements, but cannot recover any excess as a condition to relief. Therefore, whether the improver is entitled to recover depends on the form of the relief that the plaintiff seeks.

The basis for this distinction is purely historical and has no place in a merged system. The common law rule was that the improver forfeited all improvements. The court of chancery, however, adopted the rule of the civil law, which permitted restitution. Since actions for mesne profits were originally commenced in the chancery court, as the plaintiff needed the remedy of an accounting, such an action was considered equitable in nature and when it was recognized by the law courts, recovery was permitted. But since the law court could not enter a conditional decree, the defendant could not recover any excess. Therefore, today courts do not permit recovery in actions for ejectment, since they are "legal" actions, even though such recovery would be allowed if the plaintiff could not bring ejectment, since then his action would be "equitable." Reimbursement is also said to be permitted in those states where ejectment is considered to be an "equitable" action.

This historical explanation of the distinction demonstrates the fallacy of recognizing it today. Under a merged system the court has

342. Such a distinction is difficult to justify, at least where the owner is now in possession.
343. See, e.g., Buswell v. Hadfield, 202 Ark. 200, 149 S.W.2d 555 (1941); Wakefield v. Van Tassell, 218 Ill. 572, 75 N.E. 1058 (1905); Putnam v. Tyler, 117 Pa. 570, 12 Atl. 43 (1888). In Fricke v. Safe Deposit & Trust Co., 183 Pa. 271, 38 Atl. 601 (1897), the court refused to allow an accounting action in equity after the ejectment proceedings. See also the discussion at notes 28–30 supra and accompanying text, as to betterment statutes affording an exclusive remedy.
344. Kester v. Bostwick, 153 Fla. 437, 15 So.2d 201 (1943). For a full discussion of the general rule see RESTATEMENT, RESTITUTION § 42 (1937). The illustrations indicate the absurdity of the present approach.
345. In Kester v. Bostwick, supra note 344, the court observed as follows:
   Equity adopted the rule of the civil law. When the legal owner comes into court seeking an accounting for mesne profits after a judgment in ejectment, relief may be granted on condition of compensation to the bona fide holder for improvements made by him. This on the principle that he who seeks equity must do equity. From the rule thus adopted, the action of trespass to recover mesne profits was developed. Many states have incorporated the principle of the rule into betterment acts providing compensation for permanent improvements. Id. at 446, 15 So.2d at 206.
346. See RESTATEMENT, RESTITUTION § 42, illustration 2 (1937).
347. Justice Holmes' observation that "it is revolting to have no better reason
succeeded to both the "legal" common law rule and the "equitable" civil law rule and can apply either, irrespective of the type of remedy sought. The courts should allow or prohibit recovery for improvements as a condition to relief as it deems proper, but without reference to the theory of the plaintiff's case. As has been stated, the power to grant conditional relief inheres to any court, but if further justification be needed, it can be said that the merged court has now succeeded to the powers of the former court of chancery and can use those powers in any case. Courts have many remedies that they can give, and it is immaterial whether the remedy was historically denominated as "legal" or "equitable" except as the constitution requires, e.g., the right to a jury trial. The court from which the power was inherited does not affect the ability of the court presently to employ it. It is hoped that the courts will recognize the true basis of their power to grant conditional relief and will do so in every proper case.

It is on this note then that we conclude the discussion of conditional relief. It is a remedy calculated to adjust all rights between the parties and achieve a fully just result. It should be employed where feasible in any kind of action, with the limitation only that the court should not use this power to destroy valid legislative policies. In the final analysis, most of the problems relating to the administration of conditional relief can find their source in the historical distinction between law and equity. Where that distinction has been abolished in actuality as well as in name, the courts are not likely to refuse conditional relief in a proper case, nor grant it in an improper one. Remedies exist only to give meaning to the interests and expectations of persons and to effectuate the policies of the society in which we live. They have no significance for their own sake and when such significance is attached to them, the values and purposes of our legal order are appreciably injured. As in any other type of relief, the court must keep in mind this basic function of a remedy when administering conditional relief.

for a rule of law than that so it was laid down in the time of Henry IV," and that "it is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past," The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), though perhaps trite due to repeated citation (which may really be because so many such rules still persist), is most applicable here. The reason for the rule, if ever sound, has ceased to exist upon a merger of law and equity.

348. In the area of criminal law, the court feels no need to adopt different substantive rules of criminal law, because some crimes come within the guarantee and others do not. There is no reason why courts administering civil relief should do so either. The historical basis of the trial by jury guarantee does not necessitate an historical approach to the substantive issues in a case where a question of jury trial is involved.

349. Of course, the court may not do so if the betterment statute is construed as providing the exclusive remedy. See discussion at notes 28–30 supra and accompanying text. Cf., Buswell v. Hadfield, supra note 343; Wakefield v. Van Tassel, supra note 343.
The power of a court to issue a decree flexible in its terms can insure the proper adjustment of conflicting interests that should be made. Both parties may have legitimate claims, which, nonetheless, conflict. Often, where damages are sought, one claim must be found to be more legitimate, and relief will be granted or refused on that basis. But where the relief is specific in nature, the court may well be able to give proper protection to both sets of interests as well as that of the public. Practical considerations may militate against giving full or immediate protection to the plaintiff's interest. When a court attempts to make this adjustment, it is said that it is administering experimental relief—it attempts to secure the interests of both parties, realizing that it may have to make further modifications if the results do not accord with the prediction; in some instances the results cannot be fully predicted at the time of the decree. Experimental relief benefits both the plaintiff and the defendant. It enables the defendant to satisfy the duty the court finds owing, but at the same time to minimize the adverse effect on his interests. It enables the plaintiff to obtain some measure of relief, when otherwise any relief might have to be refused due to hardship, impracticality or the like.

The leading modern case involving this aspect of the court's power is usually not thought of in these terms because of the substantive basis of the court's decision and the social problems it has engendered. But in Brown v. Board of Educ., the court's power to issue an experimental decree was used in an attempt to recognize the interests of southern and border states in cushioning the impact of a fundamental change in their social system. Had all these states acted in good faith—which they have not—the transition might have been comparatively smooth; there would not have been the need for federal marshals, or ultimately troops in one instance. In many respects this experiment has failed; however, it does not appear that there is any movement toward changing the court's decree. On balance, it would seem that even now this method of relief, if properly administered and the requisite assistance given by the executive branch of the federal government, would accomplish its purpose.

For our discussion, the point to be noted is that in ordering integration "with all deliberate speed," the Court was not applying any novel doctrine nor fashioning a unique remedy because of the case's social...
implications, but was granting an experimental decree in the tradition of any court administering specific relief. As the Court observed:

In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interests of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.354

The Court observed that primary responsibility rested with the school authorities. The lower courts were directed to retain jurisdiction of the cases and to determine whether the school authorities were acting in good faith. The defendant school boards were ordered to make a "prompt and reasonable start toward full compliance."355 The courts were authorized to grant additional time, with the burden on the defendants to show necessity. The boards were also to propose integration plans. Among the factors to be considered in determining the adequacy of the plans were administrative problems arising from the physical conditions of the schools, transportation, personnel and attendance areas, as well as the revision of local laws and regulations.

In the Brown case the Court employed the device of the experimental decree to meet the problems arising from a clash of constitutional rights with long standing social traditions. Although the conflicting interests in other areas may be less monumental, there are, nonetheless, a number of well-defined techniques that the courts employ in order to adjust them. We will now proceed to consider some applications of this mode of relief.

A. Discretionary Means of Performance

Ordinarily an injunction is framed in specific terms; the defendant is ordered not to do certain definite acts, or, when the court issues a mandatory decree, to carry out designated acts. Since violation of the decree is punishable by contempt, the decree cannot be vague in that it fails to give the defendant fair notice of what is required, analogous to the void for vagueness rule as applied to penal statutes.356 However,
the court is not bound to issue such a decree, but rather it can leave the means of performance to the defendant's discretion, reserving the power to modify the decree as it may become necessary. So long as the defendant acts in good faith, he will not be held in contempt, even though the means employed fail to eliminate the harm. When the court issues such a decree, it assumes that the plaintiff and the defendant will work together to eliminate the injury with the minimal interference upon the defendant's operations. In this circumstance such a decree enables the defendant to avoid closing down his activity. By the same token this type of decree should always be issued where there is a possibility that experiments can remedy the harm before refusing relief to the plaintiff on grounds of hardship. These decrees have the greatest practicability in the area of nuisances, though they are available whenever specific relief is sought. The underlying basis for such a decree was well explained by the court in Five Oaks Corp. v. Gathmann. In commenting on the Tennessee Copper case, the court observed as follows:

That case was retained for further action with a right to either party to apply later for appropriate relief. It was in the nature of an experimental decree, justifiable on the assumption that on the one hand specific relief might be burdensome and unnecessary and on the other hand that any specific prohibitions laid down by the court might not produce the result desired. ... [I]t shows the advisability of not being too explicit in the prohibitions first decreed. In harmony with this point of view, we think that in a nuisance case such as the one before us general decrees should be passed with only such specific prohibitions as appear to provide the only remedies. In other respects the offending party should be allowed to take such measures as in its opinion will reach the desired result. If these measures are not adequate or sufficient, further application can be made to the court ... appropriate action can be taken and the decree made more specific where it appears to be necessary.

One of the earliest cases to grant such relief was Babcock v. New Jersey Stock Yard Co., where the operation of the defendant's slaughterhouse was held to constitute a nuisance. The decree was not com-

357. See RESTATEMENT, TORTS § 941, comment e. (1939).
358. 190 Md. 348, 360, 58 A.2d 656, 662 (1948).
360. 20 N.J. Eq. 296 (E&c. A. 1869).
361. In determining whether to issue an injunction against a nuisance, the court balances twice. First it decides whether the defendant's conduct constitutes a nuisance, that is, whether he has made an unreasonable use of his property interfering with the plaintiff's use and enjoyment of his property. This can be referred to as balancing the relative interests. In doing so, it considers factors such as (1) the locality; (2) the social utility of the respective operations; (3) which party bears the risk of change; (4) whether the injury could be avoided by more reasonable use; (5) the applicability of zoning ordinances (if the activity is prohibited by the zoning ordinance it constitutes a nuisance per se, but if it is permitted, it
pletely experimental, as some definite requirements were imposed; this is often the case—the court will impose some minimum conditions and leave the remaining performance to the defendant's discretion. Here the defendant was ordered not to keep the hogs in a place where the stench would reach the plaintiff for more than three hours daily; the plaintiff was given leave to apply for modification if the time turned out to be too long for comfort. Since the defendant had introduced expert scientific testimony to show that the slaughtering operations could be improved and had made some changes, the court appointed commissioners to examine the premises and propose remedial measures. By this decree the court avoided the undesirable alternatives of denying injunctive relief to the plaintiff or forcing the defendant to remove his plant.

The use of such a decree and the consequent scientific experiments may also benefit the public as a whole because of the discoveries made through such court-ordered experiments, as happened with sulphuric acid. In Georgia v. Tennessee Copper Co., the operation of defendant's copper plant caused huge quantities of sulphur to be emitted in the atmosphere, which severely injured forests and crops. After an injunction had been denied in an earlier suit by private persons upon a balancing of the relative hardships, the State of Georgia sued in the United States Supreme Court in its sovereign capacity to enjoin the operation. The Court granted an injunction, but ordered experiments made to determine if the spread of sulphur could be eliminated. Under the terms of the decree the defendants were permitted to op-

\[\text{may still be a nuisance, e.g., a non-conforming use}.\] If the injury will occur in the future it considers whether the activity is a nuisance per se or whether the danger is imminent. If it finds that the conduct does not constitute a nuisance, then it dismisses the complaint, and the plaintiff must seek damages at law, since the defendant is entitled to a jury trial. Krummenacher v. Western Auto Supply Co., 358 Mo. 757, 217 S.W.2d 473 (1949).

However, merely because it finds that the conduct constitutes a nuisance, it does not mean the court will issue the injunction. It now balances the relative hardships to the defendant and the public against that to the plaintiff that will accrue upon the issuance of an injunction. Here it considers factors such as (1) the economic interest of the community in the carrying on of the respective operations; (2) again, the social utility of the competing operations; (3) the legality of the defendant's activity—if illegal, the injunction will issue; (4) negligence; (5) reasonable alternatives in operation; (6) delay in bringing suit, though insufficient to constitute laches; (7) the character of the injury, i.e., does it affect health or safety; (8) again, the locality; (9) the injury to the public service from the injunction, e.g., a utility; (10) plaintiff's conduct; (11) coming to the nuisance; (12) the injury to the public from the denial of an injunction. If it decides, upon a weighing and balancing of these factors, to refuse the injunction, since the plaintiff was affirmatively entitled to equitable relief, the court may award damages without a jury. See the discussion of the power of the court to award in lieu of damages where the plaintiff is affirmatively entitled to relief in Lewis v. North Kingstown, 16 R.I. 15, 11 Atl. 173 (1887).

erate their plants, provided they (1) kept daily records of their operations, (2) prevented the escape of fumes carrying more than forty-five per cent of sulphur contained in the ore used for smelting and (3) prevented the escape of gases whose sulphur content exceeded twenty tons daily for April to October and forty tons daily thereafter. The Court also appointed an inspector to observe conditions every two weeks during a six month period and make recommendations at that time. The inspectors ordered experiments conducted, which produced new processes that regulated the sulphur content to take account of seasonal variations in wind, humidity, temperature and pressure. As a result the fumes were fifty per cent less harmful. Moreover, in the course of these experiments sulphuric acid, which is now a valuable by-product, was developed.364

Such decrees have been very effective in protecting water rights. In *Arizona Copper Co. v. Gillespie*,365 the defendant was engaged in mining copper, and tailings and waste from the reduction works were deposited into streams, causing pollution. The plaintiff was a lower riparian owner who needed the water for irrigation purposes. The lower court enjoined the defendant from depositing any waste into the stream; this might have had the effect of forcing the defendant to cease operations. On appeal the decree was modified by the lower court and affirmed by the Supreme Court to permit the defendant to construct at its own expense settling basins near the heads of the canals by which the waste products would be arrested. If these canals succeeded in eliminating the deposits or other experimental methods accomplished the result, the defendant could continue operations; if not, the original injunction would be reinstated.

The use of construction to prevent the harm was also involved in *The Salton Sea Cases*.366 The plaintiff operated a salt manufacturing plant and owned salt deposits in a basin substantially below the level of the Colorado River. The defendant was developing a valley and used water from the Colorado. It constructed a diversion canal, which was the only source of supply of water for the arid valley, and some 20,000 persons were wholly dependent on the canal for water. In order to meet emergencies such as hot winds, it was necessary to run through the canal an amount of water in excess of that amount normally used. The excess flowed into the lake at a point about forty miles from the plaintiff's land. Moreover, when the river was flooded, it would break

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364. See the discussion of this point in *Van Hecke, Equitable Remedies* 384 (1959). See also *Haynes, American Chemical Industry, A History* 263 (1954).
through the canal and made the lake larger. Eventually, the lake covered the basin.

The decree ordered the defendant to cease diverting some of the excess amounts of water from the river. It also ordered it to take measures to insure that water would not flow upon the plaintiff's land and to prevent waste water from accumulating there. The means of performance were in the defendant's discretion, and it was held that he was not in contempt, even though, as it turned out, some of the waste water did enter the lake.

A recent case involved the conflicting needs of a water supplier to obtain new sources and that of the users to enjoy an uninterrupted supply. In *Crane v. Essex Fells*, users sued to enjoin the borough, which was supplying water to them, from running a seventy-two hour test to obtain a new source of water. The court permitted the borough to conduct the test conditional upon its giving adequate notice to the users and supplying them potable water from some other source while the tests were being conducted.

The other main area in which the means of performance have been left to the defendant has been cases involving nuisances due to noise and odors. In *Five Oaks Corp. v. Gathmann*, the plaintiff sued to enjoin the operation of a restaurant, which furnished curb-side service, as a nuisance. The decree prohibited curb-side service only after midnight and required the defendant to see that car lights were dimmed. It also prohibited the playing of all music after midnight. On the latter point the decree was reversed, since music could be played inside in such a way as not to disturb adjoining landowners, and the defendant was given that opportunity. A drive-in theater was involved in *Payne v. Johnson*, where due to wartime shortages it was impossible to obtain in-a-car speakers, and the defendant used loudspeakers, which annoyed neighboring residents. The plaintiff sought to enjoin the operation of the drive-in completely, but instead the court ordered the defendant to take measures to eliminate the annoyance. The decree provided that prior to 11:00 P.M. the speakers were to be operated in such a way that the words would be inaudible; after that time they were to be operated in such a way that there would be no sounds. Prior to 11:00 P.M.—which the court found to be a normal hour of repose—the plaintiff's only legitimate interest was in not having conversation and concentration disturbed by hearing motion picture dialogue; after that time he was entitled not to have sleep disturbed. The defendant was permitted to operate his activity so long as he employed means to accomplish that result. The same principle was

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367. As a result the defendant had to do acts in a foreign state. See the discussion at note 24 supra.
369. *Supra* note 358.
370. 20 Wash.2d 24, 145 P.2d 552 (1944).
applied in *Bishop Processing Co. v. Davis*,\(^{371}\) where the decree simply ordered the defendant to cease operating his processing plant in such a way as to cause offensive odors. The defendant had appealed on the ground that the court should have refused the injunction upon a balancing of the relative hardships. The court stated that it would not do so as long as there was a possibility that corrective action could be taken through experiments and the like. As these cases indicate, the interests of both parties can be fully protected by leaving the means of eliminating the harm to the defendant’s discretion under court supervision. In such a situation the court may avoid imposing the defense of balance of hardship while at the same time preserving the intended benefits of that doctrine.

### B. Delay or Time Limitation as to Operation of Decree

Often the interests of both parties can adequately be secured by time adjustments. One method is to limit the life of the decree to the period before the defendant’s conflicting interests has arisen, despite a claim of future hardship, which, on balance, would justify a denial of the injunction. In this manner the plaintiff can obtain the benefits of the decree until that time arises. In *Merrian v. 352 W. 42nd Street Corp.*,\(^{372}\) the defendant was using the adjoining land as a parking lot. The plaintiff’s building contained an iron stairway and gate, which provided a fire exit. This stairway protruded onto the defendant’s lot. The plaintiff’s building would constitute a fire hazard if the stairway and gate were removed, unless he built another exit. In answer to the plaintiff’s claim that the defendant was interfering with an easement, it was contended that injunctive protection of the easement would prevent the use of the land for building purposes. Admitting that there was a need for building expansion in the area, and that an injunction would be refused upon a balancing of the relative hardships, the court, nonetheless, granted the injunction against interference until such time as the defendant actually sought to use the land for building purposes. The interest of the plaintiff was thus protected until it tangibly interfered with the defendant’s.

The court can also delay the operation of an injunction so that the defendant can take action to mitigate or eliminate its adverse effects. In *Pennsylvania R.R. v. Sagamore Coal Co.*,\(^{373}\) the court enjoined the defendant’s drainage of waters from an acid mine into a stream used by the plaintiff. However, it delayed operation for a period of six months so that the defendant could find another way to dispose of the waters with the least possible expense. The delay will also be granted, even though the result may be to render the court’s decree ineffective.

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373. 281 Pa. 233, 126 Atl. 386 (1924).
In *Sammons v. City of Gloversville*, the city's pollution of a stream with sewage was held to constitute a nuisance. The court suspended operation of the decree for a year so that the city could either change its methods of sewage disposal or obtain legislation authorizing the very conduct the court prohibited. Another ground for delay is to permit the defendant to institute condemnation proceedings. In *Minto v. Salem Water Co.*, suit was brought against a water company to enjoin excessive use of an easement on plaintiff's land, which defendant had the power to condemn. The court delayed the effect of the decree for sixty days to give the defendant the opportunity to institute such proceedings. It also allowed the defendant a reasonable time to change the nature of its operation to conform to the deed of easement if it wished.

The court may decide that certain specified methods may eliminate the harm, and delay the decree to give the defendant the opportunity to attempt such methods. In *Transcontinental Gas Pipe Line Corp. v. Gault*, where the defendant was a public utility and the plaintiff sued to enjoin the operation of a compressor gas station which caused excessive noise and vibrations, the court adopted such an approach. It suspended the injunction for a certain period of time and gave the defendant the option to make certain improvements at its expense. If the harm was still not eliminated, then the court would consider vacating the injunction; if the defendant chose not to make the improvements within that time, the injunction would be reinstated. These cases recognize the effect of time in determining what kind of relief, if any, will ultimately be given. This is a particularly effective device to give full play to the public interest—as is indicated by the cases authorizing condemnation proceedings or requests for legislative authorization—for often a municipality or public utility is involved. Here the court also recognizes the interest of the legislature in determining the scope of permissible conduct.

C. Protection Against Contingencies

Where the giving of the requested relief might result in a future loss to the defendant that he should not be required to suffer, the court will refuse relief unless the interests of the defendant can be protected

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374. 175 N.Y. 346, 67 N.E. 622 (1903).
375. Where the legislature specifically authorizes the prohibited conduct, it cannot constitute a nuisance. Thus, if the court has issued an injunction against it, the injunction will be dissolved. Pennsylvania v. Wheeling & Belmont Bridge, 59 U.S. (18 How.) 421 (1855); Sawyer v. Davis, 136 Mass. 239 (1884); Marcus Sayre Co. v. Newark, 60 N.J. Eq. 861, 45 Atl. 985 (E.&A. 1900); Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W.2d 517 (1946). The fact that the conduct is not prohibited by the zoning ordinances does not have this effect.
376. 120 Ore. 202, 250 Pac. 722 (1928).
377. In the *Sammons* case, *supra* note 374, it was suggested that the city might have the power to condemn. If not, then it could seek such power in the legislature as well as authorization to maintain the nuisance.
378. 198 F.2d 196 (4th Cir. 1952).
by the decree. In order to safeguard those interests it imposes conditions to meet the contingencies. In some instances the threatened event will clearly occur, but its effects may vary; in others the occurrence itself is the contingency.

A recent case involved an injunction against a strike, the legality of which had to be determined by an administrative agency in the first instance. In *Locomotive Eng'rs v. Missouri-K.-T. Ry.*, the railroad had changed its method of operations, eliminating the jobs of some employees. The union, claiming a violation of the collective bargaining agreement, struck and the railroad submitted the dispute to the National Railroad Adjustment Board. It also sued in the federal district court to enjoin the strike. The Supreme Court held that the railroad was entitled to an injunction, but that the rights of the employees had to be preserved pending the outcome of the litigation, since if the board found a violation of the agreement, the strike would be justifiable. The injunction was conditioned on the plaintiff's either restoring the prior situation or paying the adversely affected employees the wages they would have received if the changes had not been made. The question of protection against contingent liability was involved in *Southern Sur. Co. v. Maney*. A workmen's compensation insurer sued employers to enforce a judgment lien for unpaid premiums. Since the insurer was a corporation going through dissolution proceedings, the defense was that the insurer would be unable to pay future compensation claims that might arise. The court allowed the insurer to enforce the lien for the full amount of the arrearages, but ordered the proceeds to be impounded for a five year period. Any sums that the defendants would be required to pay in compensation proceedings, including attorneys fees, would be repaid from those funds. Moreover, the plaintiff could obtain the funds presently by giving a bond equal to the amount. By issuing such a decree, the court enforced the judgment while at the same time guaranteeing the defendants the benefit of the insurance protection for which they paid.

Such a decree can be used to protect an apprehensive party who doubts reasonably the ability of the other to perform, though the time for performance has not yet arrived. In *Fitchner v. Walling*, the vendee of a land contract sought rescission on the grounds that the vendor could not convey good title because of an outstanding mortgage.

380. The lower court had held that under the statute only the board could grant such relief. The statute was construed as not interfering with the power of the court to grant conditional relief. Statutes authorizing the courts to enforce administrative rules have generally been construed as not limiting the court's traditional powers with respect to granting relief. See, e.g., Hecht Co. v. Bowles, 321 U.S. 321 (1944).
381. 190 Okla. 129, 121 P.2d 295 (1941).
382. 225 Iowa 8, 279 N.W. 417 (1938).
He had previously given a negotiable instrument in partial payment. The court would not grant rescission, since the vendor might have been able to clear the encumbrance by the time performance was due. But it did enjoin the vendor from negotiating the note unless he either made provision for release of the mortgage or offered security for payment from the proceeds of the note upon transfer. Thus, the vendor could negotiate the note, but the vendee would be assured of receiving the agreed exchange.

These cases are illustrative of how an experimental decree can be used to prevent against contingencies and contingent liability. The flexible nature of such decrees enables the court to adequately protect the interests of all parties despite the contingencies.

D. Adjustment of Conflicting Equities

Here we are not concerned with experimental relief in the technical sense; no "experiments" are conducted and no attempt is made to protect against contingencies. Rather the court attempts to secure to both parties whatever benefits they are entitled to receive under a particular transaction. The decrees in these cases are referred to as experimental because of their underlying purpose—to secure benefits to one party without destroying the legitimate interests of the other. In some instances the decree may also have to be modified if the anticipated results are not achieved. The cases are varied, but the same purpose is present in all—to secure to each party the protection of his legitimate interest.

One situation is where both parties are in default, but the decree can keep the contract in effect. In Derr v. Hitchman, the vendor sought foreclosure of a mortgage upon acceleration of the debt due to the missing of some payments; the vendee sought cancellation, since the vendor breached his contractual duty to pay an outstanding mortgage on the property. The court gave the vendor ninety days to redeem the outstanding mortgage. If he did, he could obtain foreclosure unless the vendee paid the full amount of the debt within sixty days. If the plaintiff performed, but the defendant did not, foreclosure would be granted. If the plaintiff defaulted, then the court would grant cancellation and order an accounting. If both parties performed, each would get the full benefit of the transaction, though both were presently in default.

In Brasher v. Grayson, the court attempted to protect a creditor, a disaffirming infant and the latter's father, who was a co-obligor. The creditor paid the amount owed on the price of a lot which was pur-

383. Underlying purpose rather than technical form has been used in classification here. Of the three basic subdivisions this seems the most logical for these cases.
384. 260 Mich. 179, 244 N.W. 440 (1932).
385. 217 Ala. 674, 117 So. 301 (1928).
chased by the father and the infant jointly, and for the cost of constructing a house. Under the agreement the father would convey his interest to the infant, who, in turn, would execute a mortgage to the creditor. The infant disaffirmed. The creditor was ordered to pay into court any amount the father and son paid on the purchase price and for construction. The property was then sold to reimburse the creditor for all sums expended and any balance was to be paid to the infant. The infant and creditor were fully protected by the decree, and the father did not have to bear the entire obligation originally given by him and the son.

This type of decree can also be used efficaciously in the "lifetime care" situation. In Eriksen v. Schiller, the court assured that a daughter who could no longer care for her mother due to the latter's physical condition would have the benefit of the property, and that the mother would get the care that the daughter agreed to give. The daughter had performed her agreement to care for the mother in exchange for a conveyance of the latter's home, but due to the mother's physical condition—she was confined to a wheelchair and needed constant nursing—could no longer do so. She placed the mother in a nursing home, but could not afford to pay the entire cost. The court denied rescission in suit by the mother, but ordered the daughter to make weekly payments in an amount equivalent to the value of the room and board the mother would have received if the agreement could have been performed. The court refused to require payment of the nursing home bills, since this was not what the daughter had promised to do.

Finally, in Pitts v. Highland Constr. Co., the court prevented unjust enrichment by refusing cancellation of a trust deed for construction, even though the underlying contract, partially guaranteed by the Veterans' Administration, was illegal as a cost plus contract. Instead, the court reduced the obligation to the reasonable cost and allowable extras, but not exceeding the amount by which the maximum building cost, as determined by the Veterans' Administration, exceeded the amount of the loan. These cases demonstrate that a court need not be faced with the choice of either rescinding and giving neither party anticipated benefits, or denying one party his legitimate claims in order to protect the other. By a flexible decree adjustment of all competing interests can often be made.

In this portion of the article I have tried to review the circumstances in which an experimental decree can be used to fully protect both parties. Such use will become more prevalent as courts realize the power to mold a decree in recognition of conflicting interests. The court need not grant relief by ignoring the defendant's interests nor

386. 27 Misc.2d 794, 210 N.Y.S.2d 71 (Sup. Ct. 1960).
refuse relief because those interests or those of the public outweigh the plaintiff's. Often an experimental decree will enable the court to avoid that dilemma. This kind of decree may also be used to adjust conflicting equities and protect against contingencies. An experimental decree should always be tried, if feasible, before a court decides to protect only one party when both have legitimate interests.

III. Substitutional Relief

In this portion of the article we are concerned with when the court will give relief different in kind than that which the plaintiff sought, it view of the countervailing interests of the defendant or the public. Where the court finds that the plaintiff is affirmatively entitled to equitable relief, but refuses it as a matter of defense, then it may award "in lieu of" damages without impaneling a jury. By the same token, it will refuse to grant rescission due to fraud or mistake where it can insure the intended benefits of the transaction to the plaintiff by ordering the payment of money or reformation of an instrument. The three areas where such relief is presently most common involve (1) substitutes for condemnation proceedings, (2) substituted performance and (3) building by mistake. Although these areas are the ones that will be discussed in detail, it should be remembered that the court has the power to do this in any situation, if feasible, where the alternatives would be either to refuse relief because of the competing interests of the defendant or the public or to grant relief despite such conflict. Since the courts have succeeded to the ancient power of the chancellor to give affirmative relief against the plaintiff, the plaintiff may be compelled to take substitutional relief and a decree can be entered accordingly.

A. Substitute for Condemnation Proceedings

The New York courts have long held that where injunctive relief is sought against a municipality or public utility having the power to condemn the property with which there is the interference, relief will be refused conditional upon payment of past and permanent damages, and the plaintiff will be required to quitclaim his interest. This is

388. See the discussion at note supra.
390. See, e.g., Hugo v. Erickson, 110 Neb. 602, 194 N.W. 723 (1923).
391. Note the contrast with a true conditional relief situation. If the plaintiff does not accede to the conditions, the complaint is dismissed. In the absence of a counterclaim, the defendant has no right to performance. See the discussion at note supra, and accompanying text.
392. This is the present method of relief. Cox v. City of New York, 265 N.Y. 411, 193 N.E. 251 (1934). In Westphal v. City of New York, 177 N.Y. 140, 69 N.E. 389 (1904), the plaintiff was given the option under traditional principles of con-
the equivalent of condemnation proceedings. The court then deter-
mines the fair value of the property; this is what it means by future
damages. If the defendant refuses to pay, the injunction is granted if
affirmatively proper.

This has been required in situations where a municipality has af-
affected the natural flow of underground water by the establishment of
pumping stations, a railroad has destroyed an easement by removing
a bridge, a railroad has by mistake run tracks over land it has the
power to condemn, and a municipality has diverted water from a
riparian owner.

The question is presented as to whether such a decree can be en-
forced against an unwilling plaintiff by requiring him to execute a re-
lease. This is related to the right to trial by jury. However, if the state
constitution is interpreted as requiring a jury trial where the effect of
the decree would be to force a condemnation, the court can impanel
a jury to pass on the reasonable value of the plaintiff's property right;
this presents no obstacle to substitutional relief. The same is true if ap-
praisers must be appointed under state law. Apparently, however, most
states have not employed this device, but in such a case would merely
balance the hardships and generally refuse relief. Such an approach
works to the plaintiff's disadvantage, since he can recover only for past
damages and would have to bring repeated actions in the future, as
the defendant may never institute proceedings on the grounds that
there is an actual taking, if this is permitted. Another alternative is to
grant the injunction unless the defendant institutes condemnation pro-
ceedings, which is certainly more desirable than refusing any relief to
the plaintiff. The latter course may be more feasible, particularly if
there is a right to a jury trial. In any event, the New York courts have
achieved a sound practical result, which benefits both parties, and
which is in the public interest. It is hoped that other courts will exer-
cise their power to accomplish this result in a proper case.

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393. Westphal v. City of New York, supra note 392.
was objecting. He argued that the injunction should be denied upon a balancing of
the relative hardships. He also argued that the court could not order him to pay
money. The court emphasized that he had the option to pay the money or submit
to the injunction, since the plaintiff was affirmatively entitled to relief.
397. In Mississippi St. Hwy. Comm'n v. Spenser, 233 Miss. 155, 101 So.2d 499
(1958), where the court denied an injunction conditional on the commission fur-
nishing substituted access to the plaintiff, it also remanded the case for a deter-
mination of past and future damages in the event the state did not furnish the
access. This indicates that it would apply the approach taken by the New York
courts and order the plaintiff to quitclaim his interest upon payment of past and
(1933).
B. Substituted Performance

Here the court requires the plaintiff to take something other than that to which he is legally entitled because of the hardship on the defendant or the public if he was given that exact performance. He is not denied relief on these grounds, but given a substitute. In any event such relief is better from his standpoint than his being relegated to damages.

The public interest in substituted performance was involved in Gulf, M.&N.R.R. v. Illinois Cent. Ry. Under the contract one railroad agreed to allow another to operate over its tracks pursuant to an order of the Interstate Commerce Commission. Under the agreement the plaintiff's employees were to operate the trains. When the defendant's employees threatened to strike unless they operated those trains, the defendant sought modification of the contract to permit this and offered to bear any additional expense. The plaintiff refused and sought specific performance. The court refused to grant relief unless the plaintiff would permit the defendant's employees to operate the trains. It observed that the public had an interest in preventing strikes, and specific performance would not be granted to the injury of the public. Since modified performance was possible, the plaintiff had the option of taking it or being refused specific relief.

The commonest application of this principle involves substituted access where the plaintiff is entitled to specified access, but the defendant can furnish another, equally convenient for the plaintiff but substantially less burdensome to him. In Cookston v. Box, the plaintiff had acquired an easement by implication and necessity over the defendant's lot, but had not been using it. It was not, however, extinguished by non-user. Instead he was currently using a pathway over another lot, which was equally convenient and more desirable for the defendant. In a suit to enjoin the interference with the easement over the first lot, the court issued a declaratory judgment that the plaintiff had an easement over that lot, but refused to order the defendant to permit him to use it as long as he permitted the plaintiff to use the second lot. Here the plaintiff received all that he needed—a declaration of his rights and the access he actually was using—while the burden on the defendant was lessened.

The same principle is applicable, even though the plaintiff's rights may be based on contract or reservation. In Lindsey v. Clark, the owner of the servient tenement sued to enjoin the holder of a reserved right of way from using a driveway along the north side of the property. The latter sought a declaration that he was entitled to use the

south side, where he had actually reserved the right of way. He had, however, been using the north side. Since the owner of the servient tenement sought to enjoin the use on the north side, which the defendant admitted he had no right to use, he sought protection of his right to use the south side. The plaintiff's house encroached on the southernly right of way, and the defendant sought a mandatory injunction compelling removal of that portion. With both parties standing on their "legal rights," the court wisely applied a practical solution. It denied the defendant the use of the right of way on the south side so long as the plaintiff permitted him to use the one on the north side. The parties were in the same position as they were before each insisted on his "rights," and access was maintained without undue hardship on the holder of the servient tenement.

Substituted access may be required, even though the plaintiff has a constitutional right to the specified access. In *Mississippi St. Hwy. Comm'n v. Spenser,*401 property owners sued to require the state commission to allow them access to the highway from a portion of their property. Access had been denied on the ground that it would constitute a traffic hazard. The court found that the plaintiff had a right of access, which could not constitutionally be taken without compensation. However, the court permitted the commission to furnish a satisfactory substitute means of access.402 The interest in public safety justified the substituted access, even though it was not equally convenient to the highway. The basic concern was that the plaintiff have some access, which was insured by the decree.403 In view of the willingness of other courts to grant such relief the result in *Richard Paul, Inc. v. Union Improvement Co.*,404 is most unfortunate and indicates confusion as to the difference between conditional and substitutional relief as well as a misunderstanding of the court's power as to the latter. Under a lease the plaintiff was entitled to unobstructed use of an alley. The defendant had erected a gate across the entrance to the alley, but offered an equally convenient means of access to the leased building—the use of a parking lot adjacent to the premises. On appeal a decree requiring him to accept substituted access was reversed, and the defendant was ordered to remove the gate.

The court referred to its power to grant conditional relief as a device to force the plaintiff to concede to his adversary's "equities" in order to obtain relief. Since the defendant knew of the plaintiff's claim when it constructed the gate, it had no "equities." The court observed that: "Conditions may not be imposed to deprive a plaintiff of his full

401. *Supra* note 397.
402. The court refused to order the commission to construct a bridge in order to furnish substituted access.
403. As to the possibility of the decree as a substitute for condemnation proceedings, see the discussion at note 397 *supra.*
404. 33 Del. Ch. 113, 91 A.2d 49 (Sup. Ct. 1952).
legal rights unless they secure an equitable right belonging to the defendant, or unless they secure to the defendant some matter which the plaintiff is estopped to deny him." 405 Even assuming this to be a correct statement of the basis of conditional relief, which is doubtful, since it ignores the court's power to impose additional conditions, 406 nonetheless, it fails to consider the court's power to impose substitutional relief. The court did not require the defendant to restore barriers that formerly ran along the westernly and southwesternly sides of the alley, since the plaintiff had always left them open in the past. This merely illustrates that the court will not give any relief that the plaintiff does not actually need. But the absence of need is also the basis for the requirement that the plaintiff accept substituted access. Since such access is all that he needs, the court should not require that he have the specified access, even though he has a "legal right" to it. 407 Had the court realized that it requires the plaintiff to accept substitutional relief whenever it refuses an injunction against a nuisance or trespass on balancing the hardships and that the same principle was involved in the case before it, it might have avoided this result. Since substituted access adequately protects any legitimate interest of the plaintiff while mitigating the burden on the defendant, the court should require the plaintiff to accept it when available.

C. Building by Mistake

This involves the defendant who has built on the plaintiff's property by mistake, thinking it was his own. Often the parties are adjoining landowners. These cases differ from the ones discussed in the section on conditional relief, 408 since here the defendant was not occupying the land under a pre-existing relationship with the plaintiff, nor was he claiming title to the land against the plaintiff. Rather he thought he had title to the land on which he built. Generally, the relief given when the plaintiff seeks to require removal of the structure is to order the plaintiff to quitclaim the portion of the land on which improvements have been made—which is usually a small portion or unimproved land—upon payment of reasonable value.

The principle is demonstrated by the Canadian case of Delorme v. Cusson. 409 As a result of mutual error respecting the division line the

405. *Id.* at 124, 91 A.2d at 55.
406. We must distinguish between rights such as to title to property, which cannot be taken away by a conditional decree and rights to performance and the like. When we use the term, "right," we must be conscious of its varied qualitative meanings.
407. The court's emphasis on "legal" rights would indicate a substantive distinction between "legal" and "equitable" rights. It is difficult to see the relevance of this, insofar as a particular remedy is concerned.
408. Where reimbursement for improvements is required as a condition to relief with respect to the land.
defendant had in good faith erected a building which encroached on a small portion of the plaintiff's property, and the plaintiff sought a mandatory injunction compelling removal. The court refused the injunction, but instead required the plaintiff to accept compensation for the reasonable value of the land and quitclaim that portion.

Interestingly enough, in this country, most of the cases appear to involve independent actions by the good faith improver to obtain such relief, and such a cause of action, based on the power of the court to order substitutorial relief if the improver had been the defendant, has long been recognized. One case involving the defensive aspect of substitutorial relief, however, was Sequatchie Coal Co. v. Sunshine Coal & Coke Co., where the defendant, believing its boundary on land it had leased extended to land actually owned by the plaintiff, mined the land and made valuable improvements. In an action to enjoin the continuous trespass the court required, as a condition to relief, that the plaintiff reimburse the defendant for the value of the improvements to the extent that they enhanced the value of the land. This was applying traditional principles of conditional relief, but since the enhanced value was probably worth more than the land itself, the court gave the plaintiff the option of leasing the improved land to the defendants at reasonable rent—a specialized form of substitutorial relief. As a practical matter, it will almost always be to the plaintiff's advantage to accept substitutorial relief rather than conditional relief under these circumstances. Courts often do not even consider the alternative of the owner's paying the value of the improvements when the improver is plaintiff, indicating that substitutorial relief is the more efficacious remedy here. It should also be noted that the alternative to release the land upon payment of the value of improvements may be given in any case where the plaintiff is required to pay for the value of the improvements as a condition to relief.

An interesting adjustment based on the court's power to grant substitutorial relief, analogous to the cases involving building by mistake, was made in McCreary v. Shields. There the plaintiff, the defendant, who was the purchaser from the state at a tax sale, and the state all assumed that the sale was of an unimproved lot actually owned by the

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410. The earliest case apparently was McKelway v. Armour, 10 N.J. Eq. 115 (Ch. 1854). See also Voss v. Forgue, 84 So.2d 568 (Fla. 1956); Olin v. Reinecke, 336 Ill. 530, 168 N.E. 676 (1929); Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930); Toalson v. Madison, 307 S.W.2d 32 (Mo. App. 1957); Magnolia Constr. Co. v. McQuillan, 94 N.J. Eq. 756, 121 Atl. 734 (E.&A. 1923); Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944).
411. 25 Tenn. App. 604, 166 S.W.2d 402 (1942).
412. The alternative was offered in Hardy v. Burroughs, supra note 410, and Alamance Lumber Co. v. Edwards, 217 N.C. 251, 7 S.E.2d 497 (1940). It may have been in Olin v. Reinecke, supra note 410.
413. This was done in Johnson v. Schwarz, 349 S.W.2d 56 (Mo. 1961).
plaintiff, but, in fact, was the sale of an improved lot not owned by the plaintiff, on which he had mistakenly paid taxes. The court awarded the improved lot to the plaintiff, and the defendant was given the option of taking either the sum paid or obtaining from the plaintiff a quitclaim deed to the lot owned by him. This would have been the result had the purchaser sued to quiet its title to the improved lot against the plaintiff, who had paid taxes on it.

These cases indicate the power of the court to grant substitutional relief in lieu of damages. The court sometimes confuses this power with its power to grant conditional relief, which evolves from the same underlying principles, but which is analytically different. The power can be used to give the plaintiff all the relief he actually needs without imposing undue hardship on the defendant or interfering with the public interest. It is hoped that other courts will not adopt the approach taken in the Richard Paul case and will not give the plaintiff something he does not really need, imposing great hardship on the defendant, despite the plaintiff's "legal right" to it.

IV. CONCLUSION

In this article an attempt has been made to explore the power of a court to fully protect the rights of all parties when granting specific and declaratory relief. Traditionally, this power has been thought to be limited to the situations where the relief was equitable in nature, that is, it had formerly been administered by courts of chancery. But it is submitted that under a merged system the court can exercise this power in any case. The power is also based on the responsibility of a court to do complete justice between the parties. It can be employed in a great variety of factual situations, as the cases indicate. However, the courts should be cautious in its use so as not to defeat other policies or legislative determinations.

Two obstacles remain to full implementation of this power. The first is the failure to always recognize that there does not have to be a "winner" and a "loser" in a lawsuit. Both parties may have legitimate interests, and the court should avoid preferring one party over another, though the issue of substantive liability is resolved in one's favor. Whenever possible, the interests of both should be accommodated, and this can often be done by granting conditional, experimental or substitutional relief.

The second obstacle is the persistent refusal of courts in many instances to realize that the distinction between law and equity has been abolished except insofar as it is constitutionally necessary. This refusal

415. Such as the trial by jury guarantee. This would appear to be the only area where such distinctions have any validity. Naturally relief that was administered historically by the chancery court has come down differently than that which was formerly administered by the law court, but this is due to the nature of the relief,
results in ignoring other policies and legislative determinations when the plaintiff seeks "equitable relief," which it would recognize if the relief sought were denominated as "legal." It also results in refusing to accommodate the interests of both parties when the theory of the plaintiff's claim is "legal." These are highly undesirable results and have no place in a merged system.

In conclusion, it can be said that when the court is administering specific and declaratory relief, it often possesses the power to secure the legitimate interests of both parties in a single action. When a court employs this power wisely, it is truly dispensing justice.

\[\text{i.e., specific relief as opposed to damages, rather than the nature of the court. So called equitable principles have been incorporated into our law where appropriate, but this does not mean that equity exists as a separate body of law. Our concern with equity today, except insofar as related to the trial by jury guarantee, should be with whether specific or declaratory relief is available instead of damages. Even if law and equity had not historically been administered by separate courts, it is doubtful if specific and declaratory relief would be ordered where damages would be an adequate remedy. As our law develops further, replevin, ejectment and the extraordinary legal remedies should be incorporated in their operation with historically equitable remedies such as injunctions and decrees for specific performance. Eventually, the remedial question may simply be whether the plaintiff is entitled to specific or declaratory relief of some sort. If he is, then the court can fashion the remedy to the needs of the particular case.}\]